

North part of 1759
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AN
E S S A Y
TOWARDS A
GENERAL HISTORY
OF
Feudal Property
IN
GREAT BRITAIN,

Under the following Heads,

- | | |
|---|---|
| I. History of the Introduction of the Feudal System into Great Britain. | Succession or Descent. |
| II. History of Tenures. | VI. History of the Forms of Conveyance. |
| III. History of the Alienation of Land Property. | VII. History of Jurisdictions, and of the Forms of Procedure in Courts. |
| IV. History of Entails. | VIII. History of the Constitution of Parliament. |
| V. History of the Laws of | |

The Second Edition corrected and enlarged,

By JOHN DALRYMPLE, Esq;

C'est un beau spectacle que celui des Loix Feodales.
Un chene antique s'eleve—
——Quantum vertice ad auras
Æthereas, tantum radice ad Tartara tendit.
MONTESQUIEU.

L O N D O N :
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To the Honourable

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HENRY HOM

OF KALMS, Epsure;

One of the Lords of Council and Session

I TAKE the liberty to address
you, as to the persons who not
only led the general train
of capacity, but also them, but
to whom the law may be
found in the interest of the par-
ticulars of the law, justly be-

FEB 20 1933

C S Maclean

I know not whether this con-
fession should exist in the most
famous or most, vanity; but I feel
so much of the latter, that I am
perfectly indifferent as to the other.

As

A

To the HONOURABLE

HENRY HOME,

Of KAIMS, Esquire;

One of the Lords of Council and Session.

MY LORD,

I TAKE the liberty of dedicating these papers to your lordship, as to the person, who not only led me into the general train of enquiry contained in them, but to whom any merit that may be found in the conduct of the particulars of that enquiry, justly belongs.

I know not whether this confession should excite in me most shame or most vanity; but I feel so much of the latter, that I am perfectly indifferent as to the other.

iv DEDICATION.

As the following thoughts were directed by your lordship, and were many of them revised by the greatest genius * of our age, I have ventured to publish them to the world: I flatter myself they may prompt others, who have had advantages in any degree similar to those I have had, to trace the laws of their country with more success, than it has been in my power to do.

When the public is informed, that many papers which were open to me, have been wrote by your lordship, upon similar subjects, the highest impatience will arise, for the communication of ideas, in which none of the deficiencies or

* President Montesquieu.

DEDICATION. v

errors of the following sheets will appear.

I have the honour to be, with the highest respect and gratitude,

Your lordship's obliged,

And most obedient

Humble servant,

Edinburgh, 1757.

The AUTHOR.

PREFACE

THE following chapters contain an attempt to trace from the earliest feudal times, the growth and development of the law which has been the basis of the English system of law. It is to be noted that the law is not traced to its origin, but to its development, and to the manner in which it has been modified by the influence of the various factors which have acted upon it.

The present work is, however, not intended to be a history of the law, but a study of its development. It is to be noted that the law is not traced to its origin, but to its development, and to the manner in which it has been modified by the influence of the various factors which have acted upon it.

The right of the law, however, have been distinguished the feudal from all other law. Many of the rights distinguished according to that law now prevail.

P R E F A C E.

THE following chapters contain an attempt, to trace from the earliest feudal times, the great out-lines of the laws which relate to land property, in England and in Scotland, so far as they are derived from a feudal origin ; to mark their variations in different ages, and to assign the causes of those variations.

The progress of these laws, however little attended to, is in both countries uniform and regular, advances by the same steps, goes almost in the same direction, and when the laws separate from each other, there is a degree of similarity in the very separations.

The rights affecting land property, have chiefly distinguished the feudal from all other laws. Many of those rights distinguished according to that law, now prevail

viii P R E F A C E.

prevail in Britain, and the remains of many more, may still be seen and felt.

Such a progress is the more to be attended to, because until the subjects of England and Scotland have a knowledge of each others laws, there never will be a perfect union of the two kingdoms.

Will a subject of the one country lend money in the other, when he knows not by what process he is afterwards to recover it? Will he buy land in the other country, when he knows not what security he is to have in possessing it? An inhabitant of Northumberland makes no scruple to purchase an estate in Middlesex or Kent, who yet will not buy the next field to him on the north of the Tweed; and people on this side of the border, make as little scruple to lend their money on estates, at the most northern extremities of Scotland, who yet will not trust a shilling, on a Northumberland security, at their doors.

At the same time I am far from thinking our old laws in Scotland, should

P R E F A C E. ix

upon every occasion be overturned, to make way for an union with the laws of England. The following papers will show, that the former approach to the latter of their own accord, and that the legislature need only let them decay by degrees, instead of destroying them at once.

The following papers were, however, undertaken with another, and a more extensive design.

The spirit of laws first suggested in France, and the considerations upon forfeiture first suggested in England, that it was possible to unite philosophy and history with jurisprudence, and to write even upon a subject of law like to a scholar and a gentleman.

That discovery being made, it appeared, that a system of law, once so universal, and still so much revered ; during the progress of which, men arrived from the most rude to the most polished state of society ; a system which has been the cause of the greatest revolutions both civil

x P R E F A C E.

vil and military ; a system connected equally with the manners and with the governments of modern Europe ; deserved an enquiry in the republick of letters, independant of the present and particular use of that enquiry, in any particular kingdom.

ADVERTISEMENT.

IN this edition many facts are added to confirm the principles laid open in the former : the other alterations in this edition, arise from correcting errors of the press, and inaccuracies of stile.

In the course of the following papers, some modern writers are sometimes quoted, who may perhaps not be quoted as authorities in courts of law : when the author does this, he does it to avoid the parade and embarrassment of too great a number of citations ; but means at the same time to refer the reader to the authorities to which these writers refer, and on which they support their propositions. Where these supports are wanting, he quotes no modern author, however worthy of credit, except to prove the modern law.

E R R A T A.

Page 69, note line 2, *for* R. 1. cap. 1. *read* R. 2. cap. 1. Page 78, line 16, *for* very earliest ages *read* very early ages. Page 98, line 15, *for* common cognizances *read* common recognizances. Page 199, line 4, *for* this restraint *read* this restraint.

C H A P. I.

History of the Introduction of the Feudal System into Great Britain.

IT is now generally agreed, that the Feudal Laws derived their origin from the ancient Germans; under which denomination ^{Germans,} were comprehended all the northern nations on the continent, who, in vast bodies, issuing from their native marshes and forests, overrun the Roman empire, and settled in the territories which they conquered.

Yet in historical relations of these nations, while they were in their own country, we are not to expect relations of the Feudal Law; for during that period it existed not among them: A species rather than a peculiarity of manners and institutions, may however be observed while they were at home, which, added to a very peculiar situation when they settled in the conquered countries, was the cause of a system of laws and politicks, the most particular that ever appeared in the history of mankind; a system established by every one of those nations, however different in their dialects, separated by seas and mountains, unconnected by alliances, and often at enmity with each other.

The thought of distributing among a conquering people the lands they have conquered,

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and of annexing to the gift, a condition of military service, is in itself an exceeding simple one ; accordingly we learn from history, it has been often reduced into practice, as among some of the Roman colonies on the confines of the Roman empire, among the Timarriots in the Turkish empire, and among other nations : But there were particular circumstances attending the conquests of the German nations, which never attended those of any other conquering people ; and without a peculiarity of cause, there never will be a peculiarity of effect.

The Greek and Carthaginian colonies came from republicks ; if they did not preserve a dependance on their native country, they at least preserved a great connection with it : They went out in small bodies, and as such they formed themselves into republicks. Equality among the citizens had been a rooted and political principle with them at home, it became now, from their situation, still more the natural and consistent principle of their union.

The various conquests of Asia by Asiatics, have been made for one man, and not for a people, and therefore standing armies have always been kept up to secure them.

Alexander and his army fought not for habitations, but for glory and dominion : That dominion was maintained by armies and cities ; he and his successors reserved to themselves the ancient revenues of the prince, together with the
mili-

military and political administration of the state: The armies found a refuge in the cities for themselves and their plunder, but the ancient inhabitants preserved their land property and their laws.

The Hebrews in Canaan followed different principles of conquest; they extirpated for necessary reasons the ancient inhabitants, instead of associating with them.

The modern European colonies are kept in subjection, not only to their native country, but even sometimes to particular companies of merchants in it. They are considered merely as instruments of commerce, and are therefore generally allowed to be regulated by the laws and police which happen to prevail in the different countries from whence they came: Their principles of settlement are not determined by the natural circumstances attending a settlement, but by the particular views with which they are settled.

The Romans, who extended their empire further than all other nations, preserved their conquests too by colonies; but as the members of them were for a long time taken from the dregs of the people, they went out without any extensive subordination; afterwards when the soldiers constituted the colonies, and paid military service in return for their lands, they had indeed a regular subordination; but then their connection with their native country was not broken, and besides they were in continual danger from the

incurſions of the enemy : In theſe circumſtances, it was not natural that the poſſeſſions ſhould be hereditary ; for in the ſucceſſion to a vacant poſſeſſion, valour, where valour was ſo neceſſary, would be preferred to conſanguinity ; nor would the preference be complained of by men having connections with the mother country, and ſtill conſidering Rome as the ſeat of their fortunes. Accordingly none of the lands given under the condition of military ſervice, to the members of theſe colonies, went in deſcent ; a few given by the emperor Severus excepted, and which rather were ordered to deſcend, than in reality ever deſcended to heirs.

In almoſt all thoſe various tranſmigrations, it is obſervable, that the conquerors either conformed to the civil laws of the conquered people, if they left a people at all ; reſerving to themſelves the political and military adminiſtration ; or they retained their own laws among themſelves, leaving to the conquered people the enjoyment of theirs. The reaſon was, a contrary regulation would have been either impoſſible for them to compaſs, or uſeleſs when compaſſed.

On the other hand, in every one of thoſe various circumſtances, the ſituation of the Germans was different : As there was no general ſyſtem of government in their own country, they had been ſubjected in their various diſtricts, to that chieftain, who could do them moſt good or moſt hurt : When they iſſued abroad then, they
went

went rather as a band of independant clans, than of independant members, with a spirit of oligarchy, and not of equality.—Simple both in their manners and in their views, they could have no conception of a standing army, with the expence, and discipline, and resources necessary to support it.—On the contrary, having quitted their own countries in vast bodies from necessity, being in quest merely of a habitation, and pursuing neither glory nor dominion, but with a view to attain that habitation, they took up with the simple thought, of spreading themselves all over the country, among the ancient inhabitants.—As the nations they conquered were more numerous, so were they likewise more polished, and expert in arts than themselves; they durst not therefore put such nations to the sword.—Unacquainted even with commerce itself, they were still more unacquainted with the refinement of being made the instruments of it to others.—As long as the most distant views to their native country remained, and as long as continual danger obliged them to be ready for continual defence, the possessions, it is true, upon the death of the tenants, could not regularly descend to their heirs, who perhaps were not able to defend them, but were given to those in general, who appeared the most likely to be able to do so; yet when in course of time that situation was changed, and this valour was not so continually necessary, then the pos-

sessions we are speaking of, in contradiction to all others in the history of the world, which have any resemblance to feudal ones, became hereditary.

When such were the circumstances attending the conquests of the German nations, it followed in the course of things, that being an army, these conquerors would fall into a subordination in their settlement: It followed in the same course that being very valiant, their genius as well as situation would lead them to institutions, which made it an obligation upon almost the whole body, to be ready at a military call; and this settlement, subordination, and obligation to military service carried in themselves a system of laws, without the plan of a legislator, which, however the laws of the conquered people might for some time subsist, could not fail in the end to swallow up all the laws of all the countries where it came.

Naturally fond of the institutions of our ancestors, we are apt to make this system the result of the most consummate political prudence and refinement: But regular and extensive as the fabrick became, it was no more originally than the very natural consequence of very natural causes: In inventing other causes, we only deceive ourselves, by transferring the refined ideas of our own age, to ages too simple to be capable of forming them.

It

It has been long disputed among Antiquaries, at what time the feudal system was first introduced into England. While some have been positive, it was established among the Saxons; others have been as positive, it was first introduced by the Norman conquest.

These opinions, by certain concessions, on both sides, may perhaps be reconciled.

The Saxons in their own country, had, like all the other German nations, their princes and chieftains; they had likewise their slaves, who served them not as domesticks, but as labourers of land, in return for which, they paid a certain quantity of cloaths, and corn, and cattle. When such a people settled in a foreign country, it is naturally to be expected, that certain portions of the land would be reserved for the prince, and the rest parcelled out among the chieftains; that in order to prevent disputes about the boundaries of estates, and to make the deed more formal, these last would have their lands pointed out to them by the prince, in presence of the other chieftains, and when writing came into use, pointed out to them by a charter; and that both the prince and chieftains again would settle upon their lands, their followers of an inferior degree, and their slaves.

At the same time we are not to imagine that the whole land of the country was so distributed, or so holden. The * Germans in none of their

* L'Esprit des loix, Lib. 30. Cap. 3.

conquests assumed the property of the whole lands to themselves, the superfluity would have been burdensome; such of the ancient inhabitants then, as were allowed to live in the country, kept their lands on the ancient footing; such of the intruders too, as were not attached to any chieftain, taking possession of any vacant land that they found, enjoyed it on the same footing; both of them held their possessions at first without grant from the prince, and when writing came in, likewise without writing.

But then, as it was necessary to reduce to subjection, under government, in a political, those, who were not subjected in a feudal capacity, the king sent his own officers to judge, and to lead to war the possessors of these last lands, in the same manner as the chieftain judged, and led to war the people dwelling upon the lands, which had been granted, in a feudal form, to him.

The distinction between lands held on the ancient, and those held on the new and feudal footing, is obvious, and marked with precision in the earlier French * law. Marculfus † preserves the very form of converting an allodial into a feudal state. Lands of the former kind were called *Alleux*, the officer sent to command in them was called *Count*, those living under his jurisdiction, and possessing such lands, were called *Libres*, or in Latin *Liberi*, and often *Milites*,

* L'Esprit des loix, Lib. 30. Cap. 17, 18, 20. † Marculfus Lib. 1. Form. 13.

and were defined to be ; * *Celles qui ne reconnaissent superieure in feodalité, et ne sont sujets a faire, ou a payer aucuns droits seigneuriaux.* Such lands were classed into counties, these again into vills, and these last into hundreds ; over the vills *Vicarii*, and over the hundreds *Centenarii* were placed, the latter to act under the former, and both to act under the Count. Lands on the other hand held on the new and feudal footing were called *Feodaux*, those holding them were called *Leuds*, i. e. Lords ; the *Leuds* judged their own people, and led them to war ; their lands were not contained in the divisions and subdivisions of the counties, nor were their people subject to the officers of them. At a much later period of the feudal system in Italy, the *Allodia* and *Allodiarii* make no inconsiderable figure in the books of the Fiefs. And in the earlier feudal history of all Europe, the distinction betwixt the *Allodia* and *Beneficia*, the lords and the counts, the freemen and vassals, is without difficulty to be seen.

When this distinction was so universal among other feudal nations, during the Saxon times, is it to be believed, that it did not subsist among the Saxons ? It did subsist, and is to be found in the celebrated, though hitherto ill understood distinction, betwixt Thain Land or Boc Land, and Reve Land or Folk Land.

* Reform. custom, Art. 102.
31, Cap. 8 & 14.

† L'Esprit des loix, Lib.

Land granted to the *Thains* or Lords was called *Thain Land*; Allodial Land, over which the king's officer, called in the Saxon language, *Reve*, and afterwards sherrieff, had jurisdiction, was called *Reveland*. Again, land of the one kind being held by a charter, was at other times called *Bocland*, that is, book land; land of the other kind being held without writing, and in the ancient manner, and mostly by the ancient inhabitants, was at other times called *Folkland*. In many of the Saxon * laws, these two species of lands are continually set in opposition to each other.

This produced the distinction between the proprietors of *Bocland*, called *Thegen*, that is, lords, with the *Theoden*, who were those under them; and the superintendants of *Folkland*, called *Coples*, that is, counts or earls, with the *Ceorles*, who were those under them. A † law of Æthelstan, in enumerating the orders of the state, says, *Et ibi erant quilibet, pro sua ratione, Cople et Ceorle, Thegen et Theoden*; which first Lambard justly translates by the word *Comes*; and a law of king ‡ Ina, so far back as the 688, makes mention of counts or earls, and of their counties.

The possessors of allodial lands are, in the language of those times, to be likewise under-

* Leg. Alfrid. Cap. 37. Leg. Eadward. L. 2.
gentis, et legis honoribus in Judic. Civitat. Lund.
Ina 36.

† Lex de
‡ Lex

stood,

flood, by the general word made use of in the French law, *Liberi*, set in opposition to the slaves, and to the tenants under the dominion of the Thains. As in the French law too, the *Liberi* were defined to be, *Celles qui ne reconnaissent superieure en Feodalitè*, so in Dooms-day, the *Liberi* are expressed to be, those *qui ire poterant quo volibant*, men, in short, attached to no lord in a feignoral, but to the king alone in a political capacity; though from the same book it appears, that they often, for their greater security, put themselves under the protection of some lord.

The Folkland was divided and subdivided into Counties, Trythings, called since by corruption Rideings, and Hundreds, and over these divisions the king's officers, in the same manner as in the French law, were placed in their orders. Many Saxon laws describe these divisions, and the 35th law of Edward the confessor, near the end, enumerates the officers set over them to be, *Vice comites, et Aldermani, et Prepositi Hundredorum*, corresponding to the *Comites, Vicarii, and Centenarii* of the French, and set in opposition to the lords, who immediately follow them in the enactment of the law: *Barones vero qui suas consuetudines habent, et qui suam habent curiam, de suis hominibus videant, et sic de iis agant, et omnia rite faciant.*

As the judge of the Thain land was the Thain himself, so the judge ordinary of the Reve land

or

or Folkland was the * Reve or Shirrive, and the court in which this last judged the freemen, separate from that court in which the Thaine judged his people, was sometimes called the Remote † or Scyremote, and at other times by it is to be understood even the Folkmote.

As in France the form of converting allodial into feudal estates is to be traced, so in England great part of the book of Dooms-day is taken up with an account of the conversion of the former into the latter. From the same book it appears, that feudal often returned to be allodial estates, and returned to the subjection of the king; though he was sometimes cheated of the census laid upon them: ‡ *Hæc terra fuit tempore Edwardi Thain land, sed postea conversum est in Reve land, et idem dicunt legati regis quod ipsa terra et census qui inde exit furtim aufertur regi*, is a return often to be found in that book.

I am sensible, this account of the distinction betwixt Folkland and Bocland, is different from the various accounts given of it by modern historians, and lawyers, and antiquaries; but I appeal to the nature of the German conquests, to the analogy of law in neighbouring nations at the time, and to a general view of the surest guides in this question, the Saxon laws themselves.

Among the Saxons then, though a great part

* L. Eadweardi II.

† L. Eadgar 5. L. Cenut. 17*

‡ Dooms-day, Tit. Hereford.

of the lands of England were held by a feudal tenure, yet many of them continued still to be allodial.

And even in those which were held by a feudal tenure, the feudal relations were far from running in that regular subordination, which, with after-ages, made the feudal connections and dependancies so compleat, in the establishment, and extension of the rights of the rear vassals, that is, of the sub-vassals, who held their lands under the crown vassals, in the same manner, that these last held their lands under the crown.

Two things were great bars to the progress of the rear vassallage. In the first place, when the lands given immediately by the king, reverted to him, as they frequently did, either by the crime of the vassal, or from the limited destination of heirs; if the right of the sub-vassal had not fallen with that of the principal one, the king would then have lost the profits of the reversion. In the next place, the lords were too sensible of that independancy, which arose to them, from the hereditary enjoyment of their estates, to bestow the same power of independancy on those below themselves. Both the king and the lords then found their advantage, in limiting the interests of the rear vassals.

Accordingly, it was late * in the French law,

* L'Esprit des Loix, Lib. 31. Cap. 25.

before the rear Fiefs were made descendible to heirs. In * Italy, at the time the books of the Fiefs were wrote, the crown vassals could give in fee; but then those to whom they gave, could not give again under themselves. Among the Saxons, there is not the least reason to believe, that the grants under the lords were at all hereditary: For though we see by † charters in the later Saxon times, that some of the book lands were granted by the proprietors, to people under them, for many different services, in the form of a charter, and for one, two, or three lives; yet it is obvious that these grants were of the nature of leases, not of Fiefs, and the possessors of them were tenants, not rear vassals. Even the law of forfeiture of king Canute, and afterwards of Edward the confessor, so much talked of among lawyers, proves beyond contradiction, that the grants under the lords were not hereditary: “Qui fugiet a domino suo vel socio, pro timiditate, in expeditione navali vel terrestri, perdat omne quod suum est, et suam ipsius vitam; et manus mittat Dominus ad terram quam ei dederat; et si terram hereditariam habeat, ipsa in manum regis transeat.” An opposition is put betwixt land falling to the lord, and land falling to the king upon forfeiture: The last is called *terra hereditaria*, as set in opposition to the other, for

* Lib. Feud, 1. Cap. 1.

† Spell, tenures, Cap. 16.

a very good reason, because the possession of land under a lord was not hereditary at all.

Again, in the connections even between the king and his immediate vassals, or the lords, the tie was but slight among the Saxons. In the hereditary possession of the grant made secure to the crown-vassals; in the feudal form of the grant through a charter; in certain heriots and profits paid on change of heirs; and in the obligation to certain military duties; the outlines of the feudal system may be seen: But that infinite variety of rights, arising from the closer union, betwixt the king and his vassals, and from the subordination of that union descending through the various ranks of the nation, was as yet not known.

Nor is this backward state of the feudal institutions among the Saxons to be wondered at: The feudal system was not established at once, in any one kingdom of Europe; the Saxons besides were a cruel and extirpating race; instead of settling themselves, and spreading peaceably among the Britons, those laws, which that settlement would have necessarily involved in it; they put many of them wantonly to the sword, and drove many more into France and Wales. Thus more land being vacant than the Saxons could possess, their chieftains would not for a grant of land, submit to the severe feudal regulations; add to this, that the princes who came over, being rather plunderers than princes, their

attendants were, and continued to be, rather their associates, than subjected to them; and from thence arose that degree of equality of princes and chieftains, which is so contrary to the feudal system, and to the rights of the superior lord.

Normans.

William the Conqueror came from a country where the greater power of the prince had sooner riveted the feudal duties upon the crown-vassals, and where a longer duration and smaller interruption of the feudal principles had given time and room for the rights of the rear-vassalage to ripen. He introduced many of the laws of his own country into his new dominions: By the number and variety of these laws; the infinite number of grants made by him and his followers; the language of the feudal books which he made to supplant that of the Saxons; and many new forms and terms in which it was made necessary to manage all disputes in law, at a time when every judge was a Norman, and almost every dispute in some degree a feudal one; occasion has been given, for the opinion, that this prince was the first who brought the Primordia of the Fiefs into England.

Three general alterations were made by William, which, by their important effects, have imposed upon Antiquaries, and led them into that opinion.

In the first place, he altered the nature of a good deal of the land in the kingdom, by abolishing

lishing the distinction betwixt allodial and charter land. A great part of Dooms-day is taken up with an account of the conversion of the one into the other ; and most of those lands, as well as of all the other lands in the kingdom, he made to be held by military tenures or knight-service. This he carried so far, as to subject the church-lands to the same service, and * fixed the number of soldiers which every bishoprick and abbey should equip for the war.

Again, the distinction between allodial and feudal land being destroyed, the great offices which were founded on that distinction, should have fallen too: But William prevented this: From the greater progress of the feudal system in his country, the earldoms were become hereditary, and were held of the sovereign by a feudal tenure: The Counts, that is the Earls, again had spread the same system under themselves, and made the freemen hold of them by the same tenure. Now William, in imitation of these great feignories in his own country, † attached large territories to the title of Earl, in England, and carrying the imitation of the same feignories still further, made the earldoms hereditary; by this alteration, those honours, which among the Saxons were only official, and during pleasure, became now feignoral and perpetual.

But the great alteration which happened in

* Spell, Cod, leg. vet.

† Spell. Cod, leg. vet.

the time of William, or in that of one or two of his successors, was, : That not only these great offices were made hereditary, but that the whole fiefs of the nation, as well those holding of the great officers, as those holding of the lords, became such ; in short, the rights of the rear-vassals advanced to the same degree of firmness, with that of the more immediate vassals of the crown.

The greater progress of the feudal system had established these rights in Normandy, and they were by the conquerors transplanted into England : In consequence of this, all the effects which necessarily must follow a general extension of this kind, do immediately start up in this reign, or in a reign or two after. Thus the term * vavassour or rear-vassal we find immediately in the laws of the Norman princes.— Thus homage, if not introduced by William, had at least, all its ceremonies assigned it by him ; † which ceremonies became necessary to preserve the memory of the tenure, at a time, when not the heirs of a few great thanes holding of the king, as in the Saxon times, but the heirs of many thousand vassals holding both of the king and of subjects, were claiming possession, and could no longer even by the last be refused it.—Thus the right of escheat to the

* V. lég. Gul. lex 24. & leg. Hen. 1. lex 7. & 27.

† Comparé L'Esprit des loix, Lib. 31. Cap. 32.

lord was soon after established, over the rear-vassals, whose holdings were become by that time hereditary:—Thus the ward and marriage of the heir, of which, as Sir Henry Spellman * proves, there are no vestiges in the Saxon law, and to which indeed, the independancy of the Saxon thanes would never have submitted; we find quickly taking place among the Normans, in favour both of the king as superior lord, and of the subject as superior lord: In favour of the king, who had power to enforce them, and in favour of the subject, who when he granted his land hereditarily under himself, had been accustomed in his own country to demand, and thought he had a right to demand, the same incidents from his vassals, in return. The ward of the heir, we find from Glandville, fully established, in the reign of Henry II. and the marriage of the heir, which in its establishment could only come after the ward, is referred to, in the laws of Henry I. as a law subsisting in the time of William Rufus. The law of Henry I. it is likewise observable, ordains, that all subject superiors shall observe the same regulations with respect to their wards, which that prince there prescribes to himself, with respect to his own. † *Et præcipio ut Barones mei similiter se contineant ergo filios et filias hominum suorum.*

The question at what time the Feudal System

* Spell. tenures, cap. 14. & 15.

† Leg. Hen. I. l. 11

Scotch, was first introduced into Scotland, and by what steps it advanced, is much more difficult to be solved. The English have the laws of their Saxon kings, they have charters too as far back as the year 694; but the Scotch have no system of their law before that of David I. who began his reign *anno* 1124; nor charters before the time of Malcolm III. who began his *anno* 1057.

In consequence of these defects, it is still a dispute in Scotland, whether the feudal law was established there, as early as the reign of Malcolm II.

Perhaps by certain concessions, the differing opinions concerning the origin of the System, in this part of the island, may be likewise reconciled.

The Feudal System, we have seen, was not established at once in England, but by degrees; the same was its progress in every other country in Europe. Further, the principles of the fiefs were settled by a conquest in every country where they came, and in proportion as that conquest was perfect or imperfect, they acquired a firmer or less firm footing. Lastly, it is plain not only from facts handed down by historians *, but likewise from the famous account † of the laws of Malcolm, prefixed to the *Regiam Majestatem*, and the terms made use of in that account, that

* Craig, lib. 1. dieg. 8. n. 2. & 3. & notæ,

† Leg. Malc.
before

before his reign, some of the feudal characteristics were known in Scotland.

It is probable then, that before the reign of that prince the Primordia of the fiefs were advanced in much the same degree in Scotland, as before the time of William the Conqueror they were advanced in England. They must have taken their rise from some conquest, made by nations of German origin, in the lower parts of Scotland; and from thence been extended to the more mountainous: For those nations, wherever they went, by their subordination of ranks in conquering, and their division of the conquest when made, laid continually a foundation for the feudal structure to rear itself upon.

This situation of his country gave to Malcolm an opportunity to put the last hand to, and compleat the feudal structure: That politick prince brought the system to completion by art*; by the conversion of the allodial into feudal lands, expressed by Fordun †, and the laws of Malcolm ‡, as an alienation made by the king of all that land not yet disposed of, which, in right of the crown, was deemed to belong to the king; by the prudent distribution of the land thus converted §, and of the real || crown-lands, among his nobles; by titles of honour attached to feudal grants; by making all donations of forfeitures in the feu-

* *Essays on Brit. Antiq.* cap. 1. † *Ford. lib. 4. cap. 43.*

‡ *Leg. Malc. cap. 1.* § *Ford. loc. cit.* || *Leg. Malc. cap. 1.*

dal form; a custom which all his successors too followed; by the far greater privileges of the king's vassal, than of the Allodiaris, one of which was in most nations of German origin *, that a greater composition was exacted, and paid, for taking away the life of the former than of the latter; by that security of possession which the introduction of charters conferred, and which all were fond of acquiring; and lastly, by that influence, which the example of almost all neighbouring nations could not fail to have upon his people.

The words of Fordun describing the state of the kingdom, prior to the time of Malcolm in Scotland, and the alterations made by that prince, contain the outlines of the state of the Feudal System among the Saxons, and of the alterations made upon it by William in England :

† “ Antiquitus vero consueverant reges, suis
 “ dare militibus, plus aut minus de terris suis,
 “ in Feodifirmam, *alicujus provinciæ portionem*
 “ *vel Thanagium. Nam eo tempore, totum pene*
 “ *regnum dividebatur in Thanagiis* : De qui-
 “ bus, cuique dedit, pro ut placuit, vel singu-
 “ lis annis ad firmam, ut agricolis; vel ad de-
 “ cem annorum, seu viginti, seu vitæ terminum,
 “ cum uno saltem, aut duobus hæredibus, ut
 “ liberis et generosis; quibusdam itaque, fed
 “ paucis, in perpetuum, ut militibus, Thanis,

* L'Esprit des loix, lib. 31. cap. 8.

† Ford. lib. 4. cap. 43.

“ prin-

“ principibus. Malcolmun autem in donis ita
“ largum fuisse, ut cum omnis totius regni, cer-
“ tas regiones et provincias, ritu priscorum, in
“ propria possessione tenuerat; nihil inde possi-
“ dendum sibi retinuit.”

From this relation it appears, that the kings of Scotland had originally assigned to their officers certain portions of land, which were erected into Thaindomes; that however the whole land of the kingdom was not portioned out in this manner; that on the contrary part of it was under subjection of the prince; but that Malcolm distributed this remaining part of the country among his nobility; or in other words converted all the allodial land of his kingdom into feudal.

In return for the favours conferred by this prince, and in consequence of the foundations laid by him, the ceremonies of homage were established, the incidents * of ward and marriage were conferred; and in a state of the Scotch nation ripe for the reception of the Feudal System, the natural course of things, and the prudence of the Scotch monarch, brought about in one part of the island, what in a state of the English nation, equally ripe for the same reception, the violence of the English monarch enforced in the other.

* Ford, loc. cit. Leg. Malc. loc. cit.

CHAP. II.

History of TENURES.

SECT. I.

Species of
tenures.

Military
tenure.

AS the principles of the Feudal System were founded in conquest, as all its relations tended to preserve and defend that conquest; so most Fiefs were originally held by a condition of military service.

This connection betwixt the nature of a fief and the military service, was understood to be so necessary, that it lasted even till the latest times in the law. * In England, before the twelfth of Charles II. if the king had granted lands without reserving any particular service or tenure, the law creating a tenure for him, would have made the grantee hold by knights-service; and in Scotland, before the 20th of George II. all lands were presumed to be holden ward, that is, by knight-service, unless another holding was expressed.

Soccage
tenure.

In all the German settlements, after the division of the conquest, both the princes and the chieftains divided the possession

* Viner voce tenure (K.)

of the lands which they obtained, partly among the bravest of their followers, who in return were to attend them in war; partly among such as inclined to be husbandmen, called in the complement of the Confessor's laws, Sokmen, from whom they received in return certain quantities of corn and cattle, and cloaths; and partly among their slaves, called in the same complement villains, who laboured the ground for behoof of their masters who had settled them upon it.

The contempt which in those martial ages, was entertained for every man who was not a soldier, * brought the Sokmen in estimation very much upon the same footing with the villains. A law of Edward the Confessor † puts an equal valuation on the life of a Sokman and of a Villain, *Manbote in Danelaga de Villanno et Sockmanro 12 oras.*

Hence, during a long time in the feudal settlements the possessions of the husbandmen were rather leases than feuds, and the possessors of them rather tennants than vassals. They were despised in the commonwealth; in every different nation they had a different name of baseness, as in France that of Roturiers, and in Britain that of Sokomen; they were subjected to the meanest services, and, as appears from the book of Doomsday, were inconsiderable in num-

* Vid. Spellm. gloss. voce Socmannus.

† Leg. Ed. L. 12.

bers; they bore no part in the councils of the nation; those who held of the king in capite, by knights service, being the only vassals who were originally admitted into these councils; even the price of their lives was estimated very low in the law; and at a period when the possessions of the military vassals were become hereditary, those of the husbandmen, as appears from all the Saxon charters *, to such people, were either during pleasure, or at most for life or lives.

But in process of time, these husbandmen having continued long in possession of the land, and during a more settled state of affairs, being grown into estimation in the commonwealth, began to claim, and with little opposition, an inheritance in the land: This claim made good caused Soccage to be considered as a regular tenure, and gave firmness to it as such.

As the times too grew more peaceable, and the new conquerors were more safe in their conquests, superiors ran very much into the practice of exchanging that military service, which was no longer of the same use as formerly, for the services of agriculture.

Further, the same peaceable manners, made the minds of men be shock'd with the bondage of their fellow-creatures; † Villains were enfranchised, the slavish tenure of villenage, which

* Vid. Spellman of tenures. † Lyttlet, sect. 204. et seq.
Mad. form. anglic. tit. Manumission of villains.

had taken its name from the objects of it, was deemed to be too severe, and by degrees was converted into Soccage, a tenure better accommodated to the more civilized dispositions of mankind.

Thus the tenure, by knights-service, and the tenure by villenage, the one sinking, and the other rising in dignity, falling both gradually into the ballance of Soccage tenure, this last extended itself daily in Great Britain over land-property.

The extension of Soccage, was a deviation from the original feudal relations; the alterations in the rents of Soccage were the effect of an equal deviation from feudal manners.

Lyttleton observes, * that vassals by Soccage, paid originally the actual service of the plow, in lieu of any other rent, and that from thence they got the name of Soccomen.

But afterwards, it appears, that they came to pay a certain rent in corn and cattle. According to Sir Henry Spellman †, the word Farm or Feorme, which in his time was sometimes used to signify rent, signified antiently corn and cattle; and Gervas ‡ of Tilbury relates, that he has seen in the reign of Henry I. several of the king's vassals, driving their rent of corn and cattle to the king's court, but that the same prince

* Lytt. sect. 119. den, vol. 1. p. 1003.

† Spellm. tenures, cap. 7.

‡ Sel.

going abroad, and having occasion for money, sent people through the kingdom to value the rents, and that in each earldom a vicarius was placed, to bring those rents converted into money, into the exchequer.

The alteration made by this prince, was made by a great many other superiors, who not residing on their estates, as superiors had done in the severe ages of the Feudal System, were glad to exchange the original duty of military service, for the service of agriculture; and that afterwards for the payment of corn and cattle; and that at last for the payment of a certain stated sum of money *.

Burgage. Thus in the original feudal establishment, it appears, that almost the whole commonwealth would be divided into two classes of men; the soldiers and the husbandmen: The first of which, by their tenures, were bound to confront danger, and the other from intestine broils or foreign invasions, were continually exposed to it. The most martial nation however, must have some artificers attending them; but these, unable to brave the dangers to which the other two bodies of the nation were accustomed, and seeing no security for themselves in the country, either retired into the antient Roman towns, or built new towns for themselves, near the castles of their respective lords.

* Lyttlet. sect. 119, 120.

At first despised among a nation of warriors, they were in the meanest condition : From a view of the situation of the towns of England in the book of Doomsday, it appears, that the inhabitants of them were anciently a mixture of people, either in the demeasne of the king, and consequently tenants at will ; or in the dominion of a variety of lords ; or *Liberi*, who had found they could not live without putting themselves under the more immediate protection of the king, or of some lord ; and that all of them were under the jurisdiction, either of the king in his burghmote, or of some lord in his court, and payed a census and taxes to the bailiffs, called Portreves, of the one or the other respectively. The famous charter of William I. to the city of London *, is no other than a mere instrument of protection ; the mighty privilege he confers upon the citizens is, that they shall be law worthy, and that they shall be capable of inheritance.

Even in the earliest times of the Feudal System in Britain, however, it appears, that both the princes and the lords were beginning to encourage these settlements. The Saxon princes and lords had allowed the towns to form themselves into † communities and gilds ; had, under pretext of protecting them, walled them round, and sometimes put garrisons of their own men

* Holingshead, vol. 3. fol. 15.

† Doomsday.

into them; had bestowed small territories for support of the community; and in return for all these favours, exacted small rents * in provisions and horse-carriages. And William † the Conqueror ordered many such settlements to be erected through the land.

In after times the benefit of these towns was still further observed; they were freed of their Portreves, and of foreign jurisdictions; their taxes and lands were freed out to them in soccage; they were allowed to enjoy their own magistracies; enfranchisements were granted them; charters and privileges were conferred; and a new, feudal, free tenure was brought into the law, called tenure by Burgage; a tenure highly advantageous to those who erected it, as thereby they rendered the people who held by it dependants upon them, and the towns places of defence against their enemies.

The same security which bestowed firmness on the tenure of Socage, and which the introduction of Burgage tended to bestow on the nation, produced likewise the tenure of mortification; or, *Frank-allmoigne*, which last it was called, because the lands were held as a free alms in *Libera Eleemosina*, on the account of religion ‡.

Originally, when lands were given to the

* Vid. Doomsday. † Cart. Gul. cap. 61. Wilkins, pag. 229. ‡ Reg. Maj. lib. 2. cap. 23. n. 2. lib. 2. cap. 18. n. 3. Glanville, lib. 7. cap. 1. in prin. et in fin.

church, they were burdened with military service; this service the bishop or abbot performed in some ages by himself, and in others by a delegate: But when the necessity for it became less, people in giving lands to the church exacted no other return, than prayers and such religious exercises *.

Thus the several orders that were of value in the state, the soldiers, husbandmen, artizans, and clergy, became each the object of a distinct tenure, and the four simple forms of tenure, into which all the rest may be resolved, came, by the natural and gradual course of things, into the law.

As these three last species of tenures were extended by the more peaceable and humane genius of the succeeding times, so the same genius produced a great alteration in military tenures, both in England and in Scotland.

Originally the grants of lands were burdened with indefinite military services; but in the time of the Normans, these services Escuage. came to be distinguished one from another, and according to those distinctions military tenures got different names: Thus some lands were granted on condition of guarding a castle, and these were said to be held by castle guard; others on that of performing warlike offices about the king's person, as to carry his banner in the day

* Lyttlet, sect. 135. Stair, lib. 2, cap. 2, num. 39.

of battle, and these were said to be held by great serjeanty : Others again were granted on condition of attending the king in person on foreign expeditions, and these were said * to be held by Escuage.

Of these last consisted the greatest part of the feudal property in the kingdom.

According to the books of the Fiefs †, all vassals were originally obliged to perform their services in person ; afterwards, as the severity of the feudal law declined, and it became indifferent to superiors, whether the service was performed by the vassal or by another, the vassals by Escuage in England got into a way of not attending in person ; instead of such attendance, they sent deputies in their places. To this practice long acquiesced in, a sanction was given, by a judgment, in the reign of Edward III. ‡ But still the fief, as appears from a case in that of Henry I. was forfeited, if the deputy was not sent §.

In further process of time, as superiors became still less exact, vassals became still more remiss ; they did not even take the trouble of sending their deputies, but gave a compensation in money to the lord, according to an assessment determined by parliament ; and for this compen-

* Spellm. of feuds, cap. 22. Mad. hist. of excheq. fol. 431.

† Lib. feud. 2. ‡ Lyttlet. sect. 96. § Seld. notes on Hengage, 114, 115.

sation he could only distrain, but not subject his vassals to forfeiture.

At the same time, as superiors had still great power over their vassals, they exacted, and distrained for exorbitant sums, under pretence of this compensation.

To elude these exactions, the vassals invented, what is called by Lyttleton the Escuage-certain; by this they became bound in the charter, to pay a certain, stated sum of money, in lieu of attendance in person, or by deputy.

This produced the distinction betwixt Escuage certain, and Escuage uncertain; for where such provision was not made by the vassal, or where it was provided that the composition should be regulated by the assessment of parliament, the Escuage was called uncertain *.

In this last the superiors continued their exactions, nor when they laid on and levied them, did they give the vassals the ancient alternative of paying in service, or in money, as they pleased: On the contrary, Henry II. upon occasions of war, used, without summons, or any other ceremony, to assess a sum upon every knight's fee, for the exigencies of the war †.

But what was laid on by this prince with some moderation, seems to have been laid on by succeeding princes without any; and the example

* Lyttlet, sect. 120. † Madox history of excheq. pag. 435.

of the fovereign with regard to his vassals, was followed by the lords with regard to theirs.

These assessments raised so great clamours in the whole nation, that they became, in the reign of king John, one of the chief sources of contention betwixt that monarch and his subjects. These last prevailed; John signed the *Magna Charta*; one clause of it was, * *Nullo scutagio ponatur in regno nostro, nisi per commune concilium regni nostri*: And though this concession concerned only the king, with regard to his vassals, by Escuage uncertain; yet it was equitably extended to all mesne lords and their vassals by escuage uncertain, these being obliged to pay, and those to accept, Escuage, at the rate assessed by parliament.

The Escuage certain came to be deemed altogether a Soccage tenure, and therefore was only subject to the duties of it; but the Escuage uncertain, on the contrary, continued still subject to the incidents of ward and marriage. This last then came to be a strange mixture of military and Soccage holding; as it was subject to ward and marriage, it was of the former kind; as it paid money, instead of military service, it was of the nature of the latter.

Tax-ward. In Scotland the severity of the military tenure came to be softened after a different manner.

As our only incursions were into England,

* Chart. Joannis,

they

they were easy; we had but little money, or occupation, and being weaker than the enemy, we were obliged to keep our discipline strict: Thus our vassals did not decline the military expedition; nor could they easily give a recompence in lieu of their attendance; nor in our dangerous situation, were such dispensations to be at all allowed.

For these reasons, the obligations to military service continued very long in the Scotch law *, even as long as we had wars with our neighbours in England.

But then, as the burthens of ward and marriage were not so intimately requisite in our military holdings, the profits arising from these incidents were estimated by a great many superiors and vassals among themselves, at a moderate rate. These vassals paid the estimation agreed upon, to be freed from the incident, and *Taxt-ward* was brought into our charters and law books.

Taxt-ward, like the *Escuage* uncertain of the English, was a strange mixture of military and *Soccage* tenure; performing military service, it was of the nature of the one; paying a certain sum of money, it was of the nature of the other.

Thus while, in the military tenures of England, the military service was gone, and the wardship remained; in many of the military tenures of Scotland the wardship was gone, when yet the military service remained.

* Craig, lib. 2. dieg. 11.

Blench
holding.

The same advancement of the interest of the vassal upon that of the superior, which in England created the distinction betwixt Escuage certain and uncertain, and in Scotland converted ward-holdings into Taxward, produced likewise a considerable alteration in many of the tenures by Soccage.

Originally, when the king and lords granted their lands to be held in Soccage, or converted those before held by military into Soccage tenures, they received the full value for that grant or conversion.

But when the feudal manners began to give place to a certain degree of luxury, superiors who were in want of money to support it, were willing to give to their vassals, who had got money through it, lands, at very low rents, in consideration of large sums delivered at one payment.

These rents complained of as low in many statutes, became gradually lower, from the necessities of superiors: In proportion too as lands were improved, or by the sinking of interest rose in their values, these rents, when compared with the real rent, had the appearance of being still more low, than without those alterations they would have appeared to be.

The author of the old tenures * reckons it Feefarm, when the third of the value of the rent is the sum paid.

* Tit. Feefarm.

However,

However, the rent became afterwards still less, and in the end people got into the practice of laying aside a rent altogether, and took directly an elusory duty, as a rose, a pair of spurs, &c. if demanded, which produced the holding called *Blench* both in England and Scotland.

Most of the lands in Great Britain having been converted through time into this holding, the king lost his power over the crown vassals, and the crown-vassals their power over the people.

S E C T. II.

AFTER the foregoing general view of the progress of the different species of tenures, it will be proper to observe the more immediate fruits and perquisites of them.

Fruits of tenures.

Antiently almost all lands were held by military tenures; in these the lord was in reality proprietor, and the tenant only usufructuary; in return for this his interest, the tenant gave his personal service: but when he was no longer in a capacity of performing that service, it is not to be wondered at, that the lands should have returned to the lord, to be disposed of as he pleased; accordingly in the commencements of the Feudal System, the grants were good no longer, than for the life of the vassal.

Ward of the heir.

E

In

In consequence of the same principles, when afterwards the favour of the heir was a bar to this power of disposal, and grants were extended to a man and his heirs, it still remained congruous and just, that at least while those heirs from their minority were incapable of performing the service, the fief should return to the possession of the lord.

Perhaps too in those boisterous ages, it was a favour to the heir and to the fief, to put them under the protection of the lord, at a time when the heir was incapable to defend either.

These considerations produced the right of ward in the military tenures both of England and Scotland; this right went so far, that in both nations, not only the military estate, but the person of the heir was in ward of the lord.

This last custom, strict as it was, prevailed even to the exclusion of the uncle or grand-father, almost invariably in Scotland, two hundred years ago, as may be seen from * the decisions at that period.

Marriage. In such a situation it seemed but congruous and just too, according to the same principles, that the usufructuary or tenant should not bring into the joint possession of the fief, one who was perhaps an enemy to the lord, or of a family at enmity with him. Hence flow-

* Dict. of decif. vol. 2. pag. 484.

ed the right of the lord to dispose of his vassal in marriage.

Nor was this exertion of authority esteemed so great a hardship as it would appear at present. In an age when the rude manners of men caused them to make less personal distinction in the choice of their wives ; when the fair sex were reduced to a state of insignificance, which destroyed their value, and even their agreeableness in society, and rendered them almost incapable to form a choice at all ; in an age when the woman offered by the lord to his vassal, was not ashamed to wait whole days in the church, till the reluctant lover had conquered his repugnance or compounded for it ; it was not likely that the male vassal would regard much, or the female vassal feel at all, the weight of the lord's power of disposal.

It is probable, that originally, in the very strict feudal times, the lord had the marriage of both the heir female, and the heir male, and that both forfeited, if they married without his consent.

But as there was an obvious distinction, in the importance to the superior, betwixt an heir female bringing a male foe into the possession of the fief, without the superior's consent ; and an heir male bringing only a woman of a family at enmity with the superior into it ; so there arose a difference between the penalties, upon the

marriage of the one, and those upon the marriage of the other.

Thus with regard to the heir male, it appears in Scotland, by the * *Quoniam Attachamenta*, and in England by the statute of † Merton, that if he refused to marry the woman whom his superior offered him, he was only obliged to pay the single value of his marriage; and if he married without his superior's consent, he only paid the double: Whereas, on the contrary, with regard to the heir female, it is plain from Glanville and the *Regiam Majestatem*, that the ancient law remained, so that both ‡ in England and Scotland, one who gave his daughter in marriage, without consent of the lord, forfeited his heritage: Nay, and a widow marrying *sine consensu warranti*, that is, without consent of her husband's heir, who was bound to warrant to her her dower, and to whom her new husband owed fidelity, forfeited her dower; *Tenetur tamen mulier cum assensu warranti sui nubere, aut dotem amittet.*

In the end however, heirs female came to be much in the same situation with the heirs male; their fiefs were not forfeited, and they paid the avails or values like the others.

Thus a statute in the reign of Edward II. || though it ordains, that the widow shall swear

* Quon. attach. cap. 91, & 93. † Ann. 20. Hen. 3. cap. 6 & 7. ‡ Reg. Maj. lib. 2. cap. 48. Glanville, lib. 7. cap. 12. || Ann. 17. Ed. 2. cap. 4.

not to marry, without the consent of the king, yet does not make her dower to forfeit, if she marries without it *.

It is probable, that at a still earlier period in the two kingdoms, the distinction had worn out; for as power over their vassals came to be of less, and money to be of more consideration to superiors, they were well contented to exchange the right of disposal, which they antiently had, with all the artifices they had used to support that right, for a sum of money in hand; and the vassals again, rather than marry women disagreeable to themselves, or run the hazard of the ancient law of forfeiture, were willing to give that sum. Bracton †, who wrote in the reign of Henry III. mentioning the penalties upon heirs, who had disregarded their superior's right of disposal, uses the words, *Sive sit masculus, sive femina*, indiscriminately; and makes the penalties to consist, not in the forfeiture of either, but in the payment of the values equally by both.

This progress, though a certain one, has not always been attended to; for our judges in Scotland, influenced by the universal practice of this gift, as it then stood, did once so far forget the penal origin of the incident of marriage, that in a dispute between the donatar of the earl of Ar-

* Staunf. perog. reg. cap. 4. fol. 21.
38, n. 1. comp. Staunf. cap. 4. fol. 21.

† Bract. lib. 2. cap.

gyle, and the laird of M' Naughton, they, by their first decision, found * a value due, even though the superior had given his explicate and ample consent to the marriage.

Non-entry.
Relief, Fine
of alienation. From the same principle from which, in the case of minors, the right of ward originally flowed, it followed in the case of majors, that the superior lord had a title to the possession, during the interval betwixt the death of one vassal, and the entry of another.

On this event originally the property returned to the superior lord: Afterwards the heir was conceived to have a right to what his predecessor had had; but still, as the obligation upon the superior to receive the heir, was not conceived to be absolute, and even though it had, as it was not easy to force him to fulfil it; heirs were contented to make a present to the lord † for their entries.

Anciently, this present was said to be given in redemption of the fief, but in after times it was said to be given in renovation of it; the propriety of the terms is not attended to, but they contain a solid distinction: At first the effects of the old principle so far remained, that when the fief was renewed in the person of the heir, it was supposed to be in consequence of a voluntary

* Stair's decisions, Jan. 3d, 1677. † Lib. feud. 5. tit. 1.

agreement betwixt the lord and him; but in after periods it was conceived to be in consequence of an absolute obligation upon the lord to renew.

From the return of the fief then upon the death of the vassal, into the possession of the lord, flowed the incident of Non-entry; a term not known in the law of England, though the incident itself was known: And from the right of the heir to repossess the fief, upon giving a present to the lord, flowed that of Relief: And upon the same principles, if it was just, that the heir should give a present for the renovation of his grant, it was much more just, upon the alienation of the fief, whereby a stranger was brought into it, that the superior should receive likewise a relief or fine for alienation.

The law in the books of the fiefs Non-entry, was extremely severe upon the non-entry of the heir: By that law *, if the heir did not enter within a year and day, his fief was forfeited to his lord.

The laws of Great Britain were never so severe; for so far as we can trace them back, all that the superior could do, upon the death of a vassal, was, to take possession of the fief, till it was relieved by the proper heir.

Thus Glanville † treating of the death of a

* Lib. feud. 2. cap. 24. † Glanv. lib. 7. cap. 9.

vassal, whose heir is of full age, says : *Domini possint feudum suum cum herede in manus suas capere* : And though he says, the heirs may retain the possession, yet that is only, *Dum tamen parati sunt relevium et alia recta servitia inde facere* : And thus by a statute of Robert III. * “ It is
 “ leifum to the king, or inferior over lord,
 “ when the vassal deceases, to seize in his own
 “ hands, his lands, until it be made manifest
 “ by an inquisition or assize, quha is heir, and
 “ gif he be righteous, and of perfect age.”

Even this power of seizure in Scotland was afterwards put under restraints. The declarator of Non-entry, or action of declaration that the vassal lay out unentered was invented ; an action not required in the statute of Robert III. nor mentioned in the old books of the law : In consequence of this, although the fief was still supposed in law to fall into the hands of the king or the lord upon the death of the vassal ; yet in fact neither the king nor the lord could without declarator enter to possession, or draw the full and improved rent of the lands.

The law of England took a different course ; for as the power of the lords over their vassals, sooner decreased in that country, they lost altogether the power of taking possession.

When I speak of the lords, I mean strictly the

* Stat. Rob. 3. cap. 19. & 33.

lords superiors, and not the king superior; for with regard to this last, he from his prerogative retained his ancient privilege.

This distinction was brought about in the reign of Henry III. The words * of a statute in the reign of that prince are: “ Si heres aliquis tempore mortis antecessoris sui, plenæ ætatis fuerit, *capitalis dominus eum non ejiciat, nec aliquid sibi capiat, vel amoveat; sed tamen inde simplicem seizinam habeat pro recognitione domini sui, ut pro domino cognoscatur; et si capitalis dominus hujusmodi heredem extra seizinam malitiose teneat, propter quod breve mortis antecessoris vel consanguinitatis, oporteat ipsum impetrare; tunc damna sua recuperet, sicut in assiza novæ desseizinæ; de hereditibus autem, qui de domino rege tenent in capite, sic observandum est, ut dominus rex primam inde habeat seizinam, sicut prius inde habere consuevit, nec heres nec aliquis alius, in hereditatem illam se intrudat, priusquam illam de manibus domini regis recipiat, prout hujusmodi hereditas, de manibus ipsius et antecessorum suorum, recipi consueverit, temporibus elapsis.”*

An opposition, and an opposition wisely observed by lord Coke †, upon this statute, is put between the lord superior and the king superior, the new custom and the old custom, the simple

* Ann. 52. Hen. 3, cap. 26.

† Coke inst. vol. 2. p. 134.

fine or relief of the lord, and the real fine or possession of the king, the mere acknowledgement of the one, and the solid preservation of the ancient right of the other.

From this time we read nothing of the possession of the lord: Bracton *, the author of Fleta † and others, treat of the right of the lord to take a relief, called by the last of these authors ‡ *Quasi prima fazina*: But they say nothing of his right of possession, exclusive of the heir; whereas the statute § *De prerogativa regis*, ratifies, and Staunford *, commenting upon that statute, explains and proves the right of the sovereign.

Relief. In the origin of the feudal law in Europe, the gift which the vassal on his entry gave to the superior †, consisted of armour.

Therefore in the Saxon law † the king had his heriots, which were a quantity of warlike accoutrements he had right to take from the goods of the deceased vassal, and which accoutrements, in those days, were more in consideration than money.

But some reigns after the conquest, when money came to be more in request than armour, this heriot was changed into relief, or the payment of a certain stated sum in money.

Heriots remaining still in some manors in Eng-

* Bract lib. 4. tract. 3. cap. 1. † Flet. lib. 5. cap. 1.
 † Flet. lib. 5. cap. 1. N° 4. § Ann. 2. Ed. 2. * Staunf.
 cap. 3. † Lib. feud. 5. tit. 1. † Leg. Canut. N° 69.

land, and * heresids having remained till very lately in some manors in Scotland, have made people consider them as fruits distinct from relief; but what the Saxon law of Canute calls heriots, the Norman law of Henry I. almost translated from it †, calls *Relevationes*: The book of Doomsday ‡ too calls the heriots in armour reliefs; *Tainus pro relevamento, dimittebat regi, omnia arma sua et equum, &c.* And though upon the change of heriots into reliefs, some lords kept up in their manors, the custom of taking the best moveable besides; yet this custom was only particular to those manors, and the heriot was far from being a general fruit, distinct in its origin from relief.

Whether the exact quantity of this gift taken in money, was fixed by law, is not very material, seeing that the law, if there was any, was not observed; on the contrary, it was customary in the first violent princes of the Norman race, to demand such exorbitant redemptions, as thro' the inability of the heirs to pay them, brought the siefs back into the hands of the princes.

This procedure by Henry I. who had a disputed succession to defend, and who was therefore more dependant upon his subjects, is complained of, and amended, with regard both to the king superior, and to subject superiors.

* Bankton, lib. 2. tit. 9. N° 69. † Leg. Hen. 1. N° 14.
‡ Doomsday, tit. Walenford.

The words of the charter of that prince are * :

“ Si quis baronum, comitum, sive aliorum, qui
 “ de me tenent, mortuus fuerit, heres suus non
 “ redimet terram suam, sicut faciebat tempore
 “ fratris mei ; sed legitima, et certa relevatione,
 “ relevabit eum ; similiter et homines baronum
 “ meorum, legitima et certa relevatione, releva-
 “ bunt terras suas, de dominis suis.”

But that advantage which the nobles had taken of the weak condition of this prince, they were obliged to depart from, in the powerful reign of Henry II. The law then was †, “ De
 “ baronibus vero nihil certum statutum est, quia
 “ juxta voluntatem et misericordiam domini regis, solent barones capitales, de releviis suis,
 “ domino regi satisfacere.”

Perhaps the nobles more easily submitted to the uncertainty of relief, because some of them might hope, by opposition or favour, to get the king to remit the relief as to them. But as these views did not always succeed, they aimed at a more solid security, in the disturbed and impotent reigns of king John and Henry III. These princes opposed them long, but they opposed in vain : The nobles made good their pretensions, at the expence of their blood, and put the ascertained quantity of relief, in a proportion according to the ranks of the vassals, into the

* Chart. Hen. 2. cap. 1.

† Glanv. lib. 9 cap 4.

great

great charter of the nation *. 100 l. was made due by an earl, 100 marks by a baron, and 100 shillings by a knight.

The same progress, and for the same reasons, is to be observed in the law of Scotland; for though in the time of the *Regiam Majestatem*, the heirs of barons were † *in misericordia regis*, yet in following reigns, as the vassals became gradually less dependant upon the king, and the right of the heir grew stronger, reliefs in general came to be ascertained in their quantity, and the heir in Scotland was rendered equally independant with the heir in England.

Reliefs were originally peculiar to military tenures, but a right so beneficial to the superior could scarce fail to be quickly extended over Socage tenants, who originally were still more dependant than the military ones. It appears from ‡ Bracton, and the § *Regiam Majestatem*, that at common law, an additional year's rent upon the succession of every new tenant in Socage, was understood to be due; but from the statute of wards ¶ of Edward I. which affirmed the common law in this respect, it appears, that superiors had chosen rather to keep the quantity of this relief undetermined, in order to have a larger field for extortion; this statute which seems to be made in favour of the vassal, after

* Mag. Chart. cap. 2.

† Reg. Maj. lib. 2. cap. 71.

‡ Bract. lib. 2. fol. 85.

§ Reg. Maj. lib. 2. cap. 71. ¶ An.

28. Ed. I.

declaring, that a free Soccoman shall double his rent after the death of his ancestor, uses these words, which relate to the former abuse, *And shall not be unmeasurably grieved.* In Scotland again, we supplied the want of a statute preventing this grievance, by a precaution in the conveyance, and put almost constantly an obligation for doubling the rent, into the Soccage contract.

The year's rent extraordinary, in Soccage tenures *, paved the way for an alteration in the manner of ascertaining the quantity of relief due in military tenures; for when the fiefs came to be dismembered, so that in the same order of men, some had very large, and others very small estates; the absurdity of making every man of the same order pay the same precise sum, and on the other hand, the difficulty of proportioning the quantity of the relief to the extent of the residue of the fief remaining undismembered, were equally great; and therefore, in imitation of the year's rent due in Soccage, a year's rent extraordinary was likewise made due in military fiefs in Scotland constantly, and in England † often.

According to the strict feudal system, as will be more fully seen in the next chapter, the vassal originally could not alienate his fief, without the consent of his lord; to gain this consent, it was natural for him, or for the new vassal, to make a pre-

* Kaimes hist. notes, N^o 15. † Viner voce Tenure (F.a.)

sent to the lord ; and on the custom of making a present to get the lord's consent, was erected a right of exacting it, in after times, when his consent could not be refused : Hence the origin and the duration of the fine of a year's rent upon alienation.

In order to avoid this fine, the vassals got into a way of alienating, but so as to make the new vassals hold of them, and not of the superior ; by which the superior lost many of the incidents and fruits of his superiority.

To correct this practice, the statute *Quia Emptores* was passed both in * England and † Scotland ; by which vassals were allowed a full liberty of alienating, and the alienees were made to hold not of the vassal, but of the superior : by the last part of this statute, superiors recovered their incidents and fruits, which was full retribution to them for the liberty of alienation given to their vassals, in the former part of it ; and therefore by these statutes it was intended, that the fines of alienation should cease.

But on the interpretation of the statute *Quia Emptores* in England, it had been found ‡, that the immediate vassals of the crown in capite, were not comprehended under the statute, and that they could not alienate without licence of the crown ; in consequence of this, the fines of alienation continued in the law § over these

* An. 18. Ed. 1. cap. 1. † Stat. 2. Rob. 1. cap. 25.
‡ Staunf. prer. reg. cap. 7. § An. 1. Ed. 3. cap. 12.

particular vassals as long as the tenure by knights service subsisted. In Scotland again, the statute itself went into disuse, and in consequence of that, the fine of alienation returned into the law, over all vassals whatever.

Aids. The extreme dependance of the vassals upon their superiors at first, and the great cordiality betwixt both afterwards, produced another incident, to wit, that of aid.

Aids were at first benevolencies of the vassals, and were given during the great festivity, or the great necessity of the lord, upon three occasions, to wit, when his son was to be knighted, when his daughter was to be married, and when his person was to be ransomed.

But * what flowed originally from regard, superiors soon changed into a matter of duty, and on a gratuity erected a right; they pretended to exact what they should only have received; and not contented with this, they extended the occasions of these aids, and under colour of them, endeavoured to tax their vassals as they pleased.

The variations in the progress of aids, were much like those of reliefs, the occasions of them were limited or extended, and the *quantum* diminished or encreased, according to the characters of princes, the exigencies of the times, and the state of the vassals.

Thus in the reigns of Henry II. and David I. the law was †: “Nihil certum statutum est, de

* Reg. Maj. lib. 2, cap. 73. Glanville, lib. 9, cap. 8.
Vid. loc. cit.

“ hujus-

“ hujusmodi auxiliis dandis vel exigendis ;” and the only limitation upon this uncertainty, was, in the general words immediately after, “ Ita tamen moderate, secundum quantitatem feudorum fuorum, et secundum facultates, ne nimis gravari inde videantur, vel suum contementum amittere.”

But in the reigns of * Edward I. and † Edward III. in England, and of ‡ Robert I. in Scotland, the occasions of exacting aids, and the quantities of the aids were not only ascertained, but when ascertained, were observed.

Aids were originally peculiar to fiefs held by military tenures ; but they had quickly been extended from military fiefs, into other species of holdings ; they were levied under the names of § Hidage, Carucage, &c. and too often at the arbitrary will of the king.

Taxes on lands were originally no part of the Gothick constitution ; the king's court was supported by the rents of his demefne lands, and by the fruits and incidents of the feudal tenures, to which the other lands of the kingdom were subjected ; and therefore it is not to be wondered at, that the subjects bore these approaches to a land-tax with impatience ; to smooth over prejudices a little, the kings, at the very times they were levying these taxes with violence, pretended to receive them as voluntary contributions : a

* An. 3. Ed. 1. cap. 36.
‡ 2d Stat. Rob. 1. cap. 13.

† An. 25. Ed. 3. cap. 11.
§ Vid. Maddox & Spellman.

statute of Edward I. * proceeds on the king's narrative, " That forasmuch as divers people of
 " our realm, are in fear, that the aids and tasks
 " which they have given to us, before time, to-
 " wards our wars, and other business, of their
 " own grant and good-will, howsoever they
 " were made, may turn to a bondage to them
 " and their heirs, because they might be at an-
 " other time found in the rolls : " And there
 are a variety of old deeds † in Scotland, in
 which the king is made to declare, that the tax
 which he then levies by voluntary contribution,
 shall not be a precedent for the future.

Things could not stand long on this footing :
 on the one hand through the decline of the strict
 feudal system, the king's feudal emoluments
 were become less, yet the exigencies of his go-
 vernment were not decreased ; and therefore it
 was obvious, that a land-tax was needed : on
 the other hand it was equally dangerous to allow
 the king to lay it on, when, or to what extent
 he thought proper ; and therefore in the reign
 of the same prince, in England, who had first
 limited the occasions, and the quantities of aids
 in military tenures, it was settled ‡, that neither
 he, nor his successors, should lay on any new
 aid whatsoever, without consent of parliament.

It does not appear, that in Scotland, any re-
 straint similar to this was laid upon the king by

* An. 25. Ed. 1. cap. 5. † Anderson's appendix N^o 21.

‡ An. 25. Ed. 1. cap. 5 & 6, An. 34, Ed. 1. cap. 1.

statute ; nor indeed was it necessary : In Scotland the feudal system took a deep root, and remained long ; that system was produced by, and produced again an oligarchy ; would we know the spirit of the ancient nobility of Scotland with respect to their sovereigns, it is to be found in their letter to the Pope, in defence of Robert Bruce ; whom, say they *, “ with due assent and
“ consent of us all, we have made our prince
“ and king. To him, as the deliverer of the
“ people, by preserving our liberties, we are
“ bound to adhere, as well on account of his
“ right as on account of his merit : Yet even
“ him, if he desist from what he has begun, and
“ shew any inclination to subject us or our king-
“ dom to England or the English, we will en-
“ deavour to expel as our enemy, as the subver-
“ ter of his and of our right ; and we will make
“ to ourselves another king who will dare to de-
“ fend us.” In such a country it was needless to restrain the king by statutes, from laying taxes on lands, he was sufficiently restrained by his own impotency, and the power of his nobility.

The rise of the great families upon the power of the crown, first stripped the king of the power of laying on a land-tax ; but in the end, the rise of the commons upon both the great families and the king, stripped both, of this power in England ; and now in Britain the laying on taxes, not only on land, but on any other sub-

* And, append. N^o 11.

ject of property, from a consuetude much stronger than any statute, belongs not so properly to parliament, as to the house of commons alone. This power, taken thus from the king, and given to the subjects, was the foundation-stone of the English liberty, and now distinguishes the British constitution, from almost all the hereditary sovereignties in Europe.

Escheat. Among many other effects, which the original situation of superior and vassal produced, and which remained in the law long after the principle itself was forgot, was the incident of escheat.

This incident branched itself into two heads; for, in the first place, if the vassal committed a delinquency, which made him unworthy of the *feud*, the *feud* escheated to the lord. In the next place, if the vassal died without leaving an heir to perform the service, the *feud* escheated to the lord.

Both incidents flowed from this principle, that there was no more than an usufruct, or pernancy of the profits in the vassal, which he being unworthy to enjoy, or having no heir capable to enjoy, reverted to the superior, and reunited itself to the property.

In the ancient laws not only of England and of Scotland, but of all feudal nations, the causes of making the fief to escheat, for offences against the honour or the interest of the lord, are without number.

In

In England, as the connection betwixt lord and tenant ceased sooner, so these penalties disappeared sooner than they did in Scotland. In the latter country, they may be traced through the reigns of most of the James's; and if we may credit the enumeration of Craig *, great numbers of them subsisted in his day.

In the end however, when land came to be a common subject of commerce, people who had paid value for it in money, refused to submit to such forfeitures, and scarce any injury done by the vassal to the lord, made the fief liable to escheat.

Yet still the escheat of lands for crimes against the publick, or against the lord through the publick, remained in both countries.

But on one crime, to wit, that of felony, this escheat had different effects in England and in Scotland.

In the first of these countries, felony was attended with corruption of blood; in the other it was not: the consequence was clear, that in the one country, the felon having no inheritable blood, his issue could not take upon his death; whereas, in the other country, the defect being only that of a tenant, as soon as the obstruction was taken away, that is, as soon as the felon died, a new tenant, that is, the heir started up.

This produced the distinction betwixt the †

* Craig, lib. 3. dieg. 3.

† Bacon voce Forfeiture.

total

total escheat in England for felony, and the partial * life-rent escheat in Scotland for it.

The too great severity of this penalty among the English, obliged them, in many of their statutes against felony, to save against corruption of blood; in these the escheat became thereby the same with that for a civil debt in Scotland, and the offender forfeited for no more than his own life.

In both the English and Scotch escheats † it is remarkable, that land escheated for a crime, went to the king for a year and day, before it fell to the lord.

This preference of the king deserves to be accounted for.

As the land of the vassal originally belonged to the lord, when the vassal became unworthy to enjoy it, it reverted to the original proprietor; but the moveables of the vassal having been acquired by his own industry, were deemed to be his own; and for his debt contracted by his crime to the publick, were forfeited to it. But it was necessary, that the publick magistrate, the king, should have some time to gather in these moveables, as well as the possession of the land, in order to do so. The use which he made of this time and this possession, and which in those days he was conceived to have a right to make, was, to carry off every thing that could

* Quon. attach. cap. 48. N^o 16.
22. Quon. attach. cap. 18.

† Mag. Chart. cap.

possibly

possibly be moved; and for the sake of encreasing the penalty, to destroy what he could not carry off. In consequence of these notions, it was his general practice, to fell the trees, pull down the houses, and as either the spirit of gain or of wantonness prompted, to waste the land. An institution of this kind could not last long: the lords had too much interest to prevent, and the king too little interest to support such national destruction; therefore the lord came into the practice of giving a whole year's rent for the king's right of waste, and got the lands safe and unwasted to himself.

In England this right of the king to the land for a year and day, and the subsequent escheat to the lord, was confined to real offences; for on outlawry in a civil action, there was no escheat * to the lord, and the king had only the perannancy of the profits of the lands, till the reversal of the outlawry, or the death of the person outlawed.

But in Scotland we made a much wider stretch; upon the denunciation of a man for a civil debt, we used a fiction of law: On account of the debtor's disobedience to the king's writ, in not appearing to pay the debt, he was supposed to be a rebel. If within the year † the debtor had been released, or in the language of the law of Scotland, relaxed by the king, he was deemed to be again a true subject; for during the

* Bacon voce Outlawry (D.)

† Quon, attach, cap. 18.
king's

king's year, the lord could not enter upon the land, and the debtor's rebellion, which had been created by one supposition, was undone by another: But if he remained a year and day at the horn, that is, without appearing to pay the debt, the lord entered upon the land, and being once entered, his right could not, by the king, or the king's pardon, be afterwards annulled.

The want of obedience to the laws, and of right police in the country, made the severity of this fiction of rebellion necessary. It was invented at a period * when the power of the crown being increased, one would have expected, that for rebellion against the king, the law of forfeiture, rather than that of escheat, should have taken place. Notwithstanding which the old law of escheat, with perhaps the hope of enticing the lords, for the sake of their own interest, to punish those who disobeyed the law, occasioned the fruits of the fiction to be given to the lord.

From the principle of escheat, it followed likewise in a very early age, that on the treason of the vassal, his lands were escheated to his superior, to wit, the king; for during that period, the king was the only person who had real vassals; the possessors of lands under his vassals, not holding their lands in descent, were rather tenants at pleasure, or for lives, than vassals.

* Reg. James 6.

When afterwards the rear-vassalage came to be established, it may perhaps be found true, notwithstanding the authority of lord Coke * to the contrary, that on the treason of the rear-vassal, his land escheated, to the lord, and that the law remained so, till it was altered by the famous statute of Edward III. † which made the lands holden of others to forfeit to the king upon treason.

But whatever be in this conjecture, this is the single instance, in which, on account of the publick nature of the crime, and of its dreadful consequences, the law of escheat was made, at one period or other, to give place to the law of forfeiture; so that on treason the lands fall to the king, and not to the lord, to the publick magistrate, and not to the private superior.

Yet in many of the laws of forfeiture for treason, the original law of escheat may be traced; of which the following are examples.

Originally on a vassal's delinquency the lands returned into the superior's hands, in the same condition in which they had gone from him; in consequence of this, he was conceived to have a right to resume the lands, without being subject to the incumbrances charged upon them by the vassal: This notion prevailed so long in Scotland, that so late as the reign of James VI. the legislature were obliged to provide by statute ‡ for the payment of the debt on which execution had passed by the donatar of escheat, that is, by him to

* Coke 3. inst. 19.
1592. Act. 145, & 147.

† An. 25. Ed. 3. cap. 2.

‡ An.

whom the crown gifted the profits of the escheat; and the treasury was afterwards obliged to add further force to this provision, by taking security continually from donatars, for the payment of the debt: Now the instance which I condescend upon, in which the principle of escheat transferred itself into the law of forfeiture, is, that it came to be a doubt in law, whether the king was bound by the onerous deeds of the forfeited person.

In Scotland, so late as the year 1688, it is certain *, the forfeited estate was not subject to any deeds or debts of the traitor, which had not received confirmation of the king; and one of the articles of grievances, presented to king William, by the convention of estates, was, *The forfeiture to the prejudice of creditors*; nor were these things remedied till the year 1690, when by statute it was enacted †, *That the estates forfeited, should be subject to all real actions, and claims against the same.*

In England, even to this day, the old rule of escheat, that lands should revert free of burdens, so far prevails in forfeiture, that the lands revert to the king ‡, disburdened from the dower of the wife; and further, though the king upon forfeiture for civil debt satisfies the creditor, at whose suit the outlawry is prosecuted, yet, according to lord Coke, he is said to do so *de gratia*, and not *de jure*.

The law of escheat is still further seen in the

* Bankton lib. 3. tit. 3. N^o 57.

† An. 1690. cap. 33.

‡ An. 5 & 6. Ed. 6. cap. 11.

law of forfeiture, from this, that by the law of England, according to lord Coke *, if an estate devolved *jure sanguinis* upon a traitor, it escheated to the lord, and did not become forfeited to the king; by the proper law of Scotland, in the same manner, it would have † escheated to the king for defect of inheritable blood. I say, *by the proper law of Scotland*; for I speak not of the English law of treason, now extended to Scotland: I say, *in the same manner*; for though in England the lands fell to the lord, and in Scotland to the king, yet in both countries they fell by the same principle ‡: In England the lord was *ultimus heres*, in Scotland the king is *ultimus heres*, and therefore what the lord in the one country took by escheat, on defect of inheritable blood, the king in the other country took by escheat, and not by forfeiture.

Perhaps too even in our own times, we might have traced the law of escheat in the statute of George I. known commonly by the name of the Clan Act, amidst all the political views with which it was made §. By that statute on the treason of the vassal in Scotland, the lands were on certain conditions relative to the superior, to escheat to him, and not to become forfeited to the king.

Again, with respect to the escheat arising from the defect of the existence of an heir; it happen'd, either when the deceased had no natural heir of blood, or when having

Escheat of
ultimus
heres.

* Coke upon Lyt. sect. 4 (Y) † Dileton voce Forfeiture, & ibid. Stewart. ‡ Bankton lib. 3. tit. 3. N^o 109. & observ. N^o 23.

§ An. 1. Geo. 1. cap. 20.

been himself a bastard, he was not in law allowed to have an heir failing issue of his own body: In the first of these cases, it is certain, by the old law-books, both of England and Scotland*, that the lord, and not the king, succeeded as *ultimus h. e. e.*

But in the other case, where the defect arose from the want of a civil heir, through the bastardy of the deceased, and the failure of his issue, some little difficulty occurs: According to the authority of the *regiam majestatem*; indeed the lord was in that case heir to the bastard.

But if we may believe Glanville †, the superior was not *ultimus heres* to a bastard, dying without issue, in England, about the same period: And if we may believe Craig ‡, and Sir John Skeen §, the king in the same manner, and not the lord, was in their time last heir to a bastard in Scotland. Perhaps we ought not to trust intirely the assertions of these authors. Not Glanville's, because in the very next reign, the lord was *ultimus heres* to a bastard, as is obvious from the authority of Bracton || and others. Not Craig's, because in another passage he directly contradicts himself; his words* in that other passage are: “ Il-
“ lud tamen interest, quod bastardo moriente
“ sine liberis, sive sit ecclesiasticus, sive laicus,
“ omnia ejus mobilia fisco jure coronæ fiunt ca-
“ duca, si testamentum non fecerit; nam bastar-
“ diæ inter regalia numerantur: at feuda ad do-

* Reg. Maj. lib. 2. cap. 55. — Glanville, lib. 7. cap. 17.
† Glanv. lib. 7. cap. 16. ‡ Craig, lib. 2. dieg. 17. N° 12.
§ Skeen, not. ad. Reg. Maj. lib. 2. cap. 52. || Bracton, lib. 2. cap. 7. * Craig, lib. 2. dieg. 18. N° 15.

“ minum suum de quo tenebantur redeunt. Ratio est, quod ea dominorum ab initio voluntas fuisse præsumitur, ut soli vassalo providerunt et ejus filiis legitimis, qui si defecerint, ad dominum debeat feudum reverti.” Not Skeen’s, because Sir James Balfour * not only gives his opinion to the contrary, but cites a judgment to the contrary, which had been given about that time, to wit, on the 12th of December 1542; and still more, because the preference of the king was contrary to the analogy of the feudal plan, and of the feudal principles at the time.

At the same time, if the law stood as these authors assert, the exception may be accounted for †; Bastards seem in many respects to have been deemed a kind of criminals in the eye of law; they were not allowed to make testaments, they could not have an heir failing their issue; when then the succession fell, it seemed to fall as if for a crime, and therefore the publick-magistrate, rather than the private superior, seemed to have an interest in it.

But whatever be in this, it is certain, that after that distant period, the lord remained *ultimus heres* in England, as long as the feudal subordination remaining, there could be room for the dispute betwixt him and the king; and in copy holds he remains *ultimus heres* at this day.

In Scotland the lord remained likewise very long *ultimus heres*. In the record ‡ of charters of the year 1506, there are on the 18th of February two

* Balfour tit. anent bastards.
Craig, lib. 2. dieg. 17. N^o 12.

† Dir]. doubt. tit. bastards,

‡ Book 14. N^o 329. & 332.

very

very striking instances of this: the king in these as earl of Marr, and not as king, grants to Alexander Coutts and his spouse, and to John Skeen and his spouse, certain lands, which he expresses had fallen by the right of *ultimus heres* to him as superior and earl of Marr, and not as king. Sir James Balfour *, who wrote before Craig, declares, that the lord was *ultimus heres*, when he wrote, and the words of Craig † are express: “ Ad dominum ratione feudi si nullus heres appareat, ex eorum numero, qui dispositione continentur, feudum redit domino, etiamsi non sit expressum, ut in eo casu caderet.”

In the reign of Charles II. ‡ it was fixed, that the king was *ultimus heres* to a bastard. If we may believe Sir Thomas Hope §, the lord, was about the same time no longer *ultimus heres*, even to other persons. Perhaps the truth of this last authority may be called in question; for one of the doubts in the law of Scotland, stated || by Sir John Nisbet, who wrote after Sir Thomas Hope, is: “ If a right be granted to a person, and the heirs of his body, without any further provision or mention of return, whether will the king have right as *ultimus heres* or the superior?”

Afterwards it appears, from a circumstance in a judgment reported by lord Fountainhall *, that even superiors were taking gifts of the escheat of their own vassals from the crown, as last heir; for in that report one of the competitors is a su-

* Balfour tit. heirs and successors. † Craig, lib. 2. c. 17. N^o 12. ‡ Dirleton tit. bast. § Min. pract. p. 276. || Dirleton tit. limit. of fees. * Dec. 9. 1677. Somervell against Tennent.

perior,

perior, who has taken a gift of his vassals escheat upon the failure of heirs.

But lord Stair put totally an end to the doubt, who was *ultimus heres* in our law. He declared *, that on the failure of heirs “ the king by his prerogative royal excluded all other superiors, who “ are presumed to retain no right nor expectation “ of succession, unless by express provision in the “ investiture the fee be provided to return to the “ superior, in which case he is proper heir of provision :” And the reason he gives for it amounts to this, and is a wise one ; that fiefs being now no longer gifts from the lord, but sold for their value in money, his ancient interest is lost. Ever since the time of that great author, the constant custom of issuing gifts from the exchequer, the acquiescence of superiors in not contesting those gifts, the opinions † of our lawyers, and the decisions of the judges, have run in the same channel, and have confirmed the right of the king, to the exclusion of that of the lord.

Nay, this law of escheat the judges have carried so far, in favour of the crown, that in the case of the estate of Masondieu, they lately found ‡, the king, as *ultimus heres*, could defeat a death-bed disposition ; although the favour due to a testator, more especially to prevent his inheritance from being caducious, be very great ; and although the privilege of impugning a death-bed disposition, may appear to have been introduced only in behalf of the heir of blood, whose rights and ex-

* Stair, lib. 3. tit. 3. N^o 47. † Bankton lib. 3. tit. 3. N^o 106.
‡ 4 Coll. July 31. 1753.

pectations are disappointed ; but not in behalf of the crown, which takes not as heir, but as proprietor of *bona vacantia*, and the expectations of which, therefore, cannot be disappointed at all.

This transfer of the right of the lord, as *ulimus heres*, into the hands of the king, without statute, without even a single decision in point on the contest, is a very singular instance of the decay of the feudal law, how it melts away of its own accord, how the rights of superiors pass from them, as their interest waxes weaker in the fief, and how the minds of men yield without force, when the variation of circumstances leads them into yielding.

S E C T III.

Present
state of
Tenures,
and their
fruits.

AFTER tracing the progress of the establishment of tenures, and of their original fruits, it may not be improper to take a general view of the fates of both.

The extent of enumeration in the different sections of this chapter, may appear tedious, but it is chiefly from this enumeration, that the basis of the feudal system, the connexion betwixt lord and vassal, can be known, and it was in the declension of this connexion, that the ruin of the system itself was involved.

Frankal- Tenures by *frankalmoigne* preserving too
moigne. little connection betwixt lord and vassal,
at a time when a great deal was required, were
very

very early restrained in both kingdoms, by the statutes * of Mortmain; after these the famous statute *Quia Emptores* †, of Edward I. barred the subjects effectually from making grants in *frankalmoigne* for the future, and the abolition of the Popish superstition, had the same effect in Scotland; for the lands held in *frankalmoigne*, were at the reformation annexed to the crown, which disposed of them upon different tenures; and now ‡ the only remains of *frankalmoigne* in this last country, are the manfes and glebes of ministers.

Military tenures preserving too much Military.
connection between lord and vassal, down to times when very little was required, shared the same fate at a later period §.

Tenures by foccage and burgage hav- Soccage.
ing in them a just moderation between Burgage,
these two extremes, have to this day a stable duration. In Scotland, they have the appearance of separate tenures; and in England * are run into each other.

The perquisites of ward and marriage Ward
being sufferable only in a very military marriage.
age, were appropriated to military holdings. In these they were † sometimes dispensed with altogether to engage the vassals to attendance in hazardous expeditions: And even when they were

* Mag. chart. cap. 36. An. 7. Ed. 1. cap. 1. 14. Nov. 2. Stat. R. 2. cap. 1. † An. 18. Ed. 1. cap. 1. comp. Lyttlet. sect. 140. ‡ Stair, lib. 2. tit. 3. N^o 39. & 40. § An. 12. cap. 2. An. 20. Geo. 2. * Lyttlet. sect. 162. † An. 7. H. 7. cap. 3. Scots Acts An. 1747. cap. 2. ‡ Diction. decis. voce tutor & pupil.

exacted, the exaction was made soft with the temper of succeeding ages.

Thus † for two hundred years past, our judges in Scotland have given the ward of the minor's person, not to the superior, but to his relations; and what the judgments of courts did in Scotland, the humanity of superiors did in England; statutes in both countries * prohibited the lord to do waste, and other statutes obliged him to give proper maintenance to the heir.

Thus again, with respect to the right of marriage, the statute † of *Magna Charta* ordained, that the heir should be married without disparagement. A subsequent statute of Henry III. ‡ made the superior, in case of disparagement, lose the ward. A statute in the reign of Edward I. repeats this penalty, and adds §, "that if the superior keep the heir female unmarried for co-
"vetise of the land, she shall have an action for
"recovery of her land, without giving any thing for her wardship or her marriage." Temperaments similar to these, were introduced into the law of Scotland, and extended in both countries. Our judges in Scotland, particularly, allowed the refusal of the marriage to be purgeable by an after consent; they modified the value of it according to circumstances; they excluded it altogether, where there was the least appearance of fraud; as for example, where the woman offered was already engaged; they took advantage of every flaw in the order of requisition, that is, the writ

* An. 3. Ed. 1. cap. 21. † Mag. Chart. cap. 6. ‡ An. 20. Hen. 3. cap. 6. § An. 3. Ed. 1. cap. 22.

requiring to marry; and though it was agreeable to strict law, where several heirs apparent of the same family had died one after the other, before the age of marriage, that the value of the marriage of each should nevertheless be paid, yet lord Durie *, who reports a decision to that purpose, says, such a claim “was never by the court of session sustained before.” And lord Stair adds †, “That he hopes it will never be sustained again.” Nay, so far did the courts of law favour the vassal, that in a dispute whether the value of the marriage was to be computed at the marriageable age of fourteen, at which time the heir had been very poor, or at the time of his marriage, when by an estate fallen to him, he was become very rich, lord Stair informs us ‡, “That the lords inclined much to ease the vassal, so far as law would allow, and that several interlocutors did pass supporting his plea.”

Agreeable to the same moderation in the judges, these two incidents of ward and marriage were, ever since the revolution, exacted with the utmost lenity, by the officers of the crown.

The severity of non-entry, made it last only a short time in England, in favour of the lord; and though that severity lasted longer, in favour of the king, over his vassals in capite, yet a statute § in the reign of Edward I. barred the king from taking possession till an office was found, that is, till he was authorized by the verdict of an inquest

* Durie's decisions. French against Cranston, July 11, 1622.

† Stair, lib. 2. tit. 4. N° 54.

‡ Stair, lib. 2. tit. 4. N° 55.

§ An. 3. Ed. 1. cap. 24. comp. Coke, 2d inst. p. 206 & 689.

to do so. Many statutes * were afterwards made to the same purpose; they all limited the king, and they all favoured the vassal.

In Scotland, not satisfied with taking away the superior's old right, when his vassal died, to enter directly upon the lands, in the same manner that the superior in England could have anciently done; and not satisfied with hampering the profits of non-entry with the necessity of a declarator, in the same manner, that in England the king had been hampered with the necessity of an inquest and office found; the judges went further, and in an equitable favour to the vassal, gave no more to the superior, even after declarator of non-entry, than the retoured or ancient duties, if the vassal had any tolerable excuse for standing out. Upon the same plan taking advantage of the ancient maxim, that relief was only due in military holdings, and of the uncertainty in which superiors had afterwards kept the quantity of relief in foccage holdings; the judges were so far from favouring the right of the lord, that they † refused to double the rent, upon the entry of an heir in foccage, unless there had been an express clause in the charter for doing it; and though in the entry of a stranger upon the superior, they were obliged ‡, by statutes, to make the composition, or fine for alienation, a year's rent of the lands, at the improved value, yet on the entry of an heir

* An. 28. Ed. 1. cap. 19. comp. Coke, 2d inst. 572. & Staunf. cap. 3. Stat. linc. An. 29. Ed. 1. An. 2. Ed. 6. cap. 8. & Coke, 2d inst. 688.

† Dict. decisions, tit. relief.

‡ Scots acts,

an. 1469. cap. 36. comp. Stair, lib. 2. cap. 4. N^o 32. an. 20. Geo. 2. Comp. Bankton, lib. 2. tit. 4. N^o 33.

against whom declarator had not been taken, they interpreted the profits to the lord to be according * to the retoured or ancient duty only; and not according to the improved rent of the lands: With these temperaments, the rights of non-entry, relief, and composition, are subsisting in Scotland; but such of them as remained in England, were overwhelmed † in the fall of the court of wards and liveries in that country.

Though the right of demanding aids Aid. of the vassal, remained in the highlands of Scotland, so late as the time ‡ of Craig, yet it wore away in that country by disuse, and in England it was put an end to by the same statute which abolished knights service. The only remain of this right now, is to be seen in the custom of parliament, to grant an aid for the dowry of the king's eldest daughter; for with respect to the land tax, it has long ago been transferred from being a feudal perquisite, to be a national supply; and in this light is now to be looked upon rather as a political, than as a feudal part of the constitution.

The monstrous severity of the incident Escheat. of escheat in Scotland for a civil debt, was abolished by the same statute, which took away wardholdings; but the other effects of it on the delinquency of a vassal against the publick, are || remaining, with a few variations equally in both

* Balfour, tit. relief, hope 124. Stairs, lib. 2. tit. 4. N^o 28.

† An. 12. c. 2. cap. 24.

‡ Craig, lib. 2. dieg. 11. N^o 22.

|| Sup. escheat for delinquency.

countries; on default of an heir again, the fruit of it * is fallen to the king in Scotland, and in England reverts to the donor, so far as by the utmost stretch of interpretation, he can be supposed to have an interest reserved in the land.

Such was the progress of tenures, and of the more immediate obligations attending them, and such the fates of both; these tenures and obligations arose, most of them at a time when the interest of the superior in the fief was extremely strong, and were therefore most of them in their origin extremely severe; but it was their uniform progress to vary with the uniformly varying situations of mankind, so that in the end, that military system which once was so universal and so severe, is now come to be limited in the nature of its tenures, and more so in the perquisites of them. The people by their customs, and by changing many of the military into civil feuds, effected the one; the judges by their interpretation, and bending that interpretation to the genius of the times, effected the other. The statute law came in aid to both. Many attempts, but in vain, had been made by parliament in England, in the reign of James I. to purchase from the king the abolition of wards and liveries. Cromwel † indeed made them to cease during his administration, both in England and in Scotland. But it was not till at a period ripe for it in the one country, and at an after period ripe for it in the other, that whatever remained in either coun-

* *Supra* escheat of last heir.
cap. 9. ann. 1656, cap. 4.

† Scobils acts, an. 1654.

try of military tenures, with the various incidents, fruits, and dependencies attending them, was laid for ever to rest. This was done * in England during the reign of Charles II. and † in Scotland during that of his present majesty, with this memorable difference betwixt the two æras, that the former prince asked and got a considerable sum, to wit, the settlement for perpetuity of one half of the excise upon the crown, to free the subject from bondage; whereas the other monarch made a present of all his severe feudal rights, to make his people happy.

C H A P. III.

History of the Alienation of Land-property.

IN tracing the history of the alienation of land-property, it will be necessary to distinguish that voluntary alienation which takes place during the life of him who alienates, from the involuntary alienation, which takes place by attachment of law; and both of these again from that alienation, which, in consequence of the proprietor's will, is to take effect after his death.

S E C T. I.

THIS subject is curious and interesting; in order to trace the progress of it, the progress of society must be traced.

* An. 12, cap. 24. Char. 2.

† An. 20. Geo. 2.

The first state of society is that of hunters and fishers; among such a people the idea of property will be confined to a few, and but a very few moveables; and subjects which are immoveable, will be esteemed to be common. In accounts given of many American tribes we read, that one or two of the tribe will wander five or six hundred miles from his usual place of abode, plucking the fruit, destroying the game, and catching the fish throughout the fields and rivers adjoining to all the tribes which he passes, without any idea of such a property in the members of them, as makes him guilty of infringing the rights of others, when he does so.

The next state of society begins, when the inconveniences and dangers of such a life, lead men to the discovery of pasturage. During this period, as soon as a flock have brouzed upon one spot of ground, their proprietors will remove them to another; and the place they have quitted will fall to the next who pleases to take possession of it: For this reason such shepherds will have no notion of property in immoveables, nor of right of possession longer than the act of possession lasts. The words of Abraham to Lot are: "Is not the whole land before thee? separate thyself, I pray thee, from me. "If thou wilt take the left hand, then will I go to the right; or if thou depart to the right hand, then will I go to the left." And we are told that the reason of this separation, was,
the

the quantity of flocks, and herds, and tents, which each of them had, and which the land was unable to support ; lord Stairs * wisely observes, that the parts of the earth which the patriarchs enjoyed, are termed in the scripture, no more than their *possessions*.

A third state of society is produced, when men become so numerous, that the flesh and milk of their cattle is insufficient for their subsistence, and when their more extended intercourse with each other, has made them strike out new arts of life, and particularly the art of agriculture. This art leading men to bestow thought and labour upon land, increases their connection with a single portion of it ; this connection long continued, produces an affection ; and this affection long continued, together with the other, produces the notion of property in land ; because it makes a man naturally conclude, that there is an injustice in taking from another, what he has been long connected with, and justified in conceiving an affection for.

The right of excluding all others from a particular spot of ground, is one step in the progress of the idea of property ; but the right of transferring it to another is a second and a wider : a man is at first sufficiently happy in the enjoyment of a spot of ground for his own use, though he has not the power of transferring it to a stranger unconnected formerly with it ; he holds his land then during his own life, and at his death his

* Stairs, lib. 2. cap. 1.

children or heirs being nearest connected with him, continue that right of exclusion which he had, and take up the vacant possession: nor is the connection of these children with the deceased their only title; having been connected long with the particular spot of ground, having bestowed likewise thought and labour upon it, it appears hard that they should not continue the father's right of exclusion, and that by his death they should be stripped of the enjoyment of what they had formerly enjoyed.

Hence for some time after the notion of property in land was established, we see in the histories of almost all nations incapacities either natural or civil in peoples power of alienating it.

Thus the * Romans in ~~the~~ very earliest ages of the Roman law, could not alienate their heritage but in *calatis comitiis*, and with consent of the people; thus the *jus retraetus* or right of redemption of relations took place † among the Jews, among the Greeks, and till within these few years, in the udal rights of the Orkney men; among all of whom the Feudal System was surely unknown.

When with these restraints, in this state of society the influence of feudal principles chances to concur, the bar against the power of alienation becomes double.

Hence in the origin of all feudal nations, the *jus retraetus* ‡ is given to relations, and the pro-

* Hein. Antiq Roman.
cap. 38.

† Ruth, cap. 4. Jeremiah,
‡ Lib. feud. 5. tit. 13. Craig, lib. 3. dieg. 4.
hibitions

hibitions to alienate, are without number : penalties are even imposed : in the books of fiefs, the right hand of him who wrote the deed of alienation, is ordered to be struck off.

This prohibition arises partly from the original principles of restraint, which were in favour of the heir, and partly from the feudal principles of restraint, which are in favour of the superior.

Instances of the effect of the last principle have been observed by every one ; for every one sees the hardship it would have been upon a superior, to have allowed that land which he had given to one family, to go to another.

But instances of the effects of the first principle have not been so readily attended to. It will be proper then to point out some of them.

In the old restraints upon alienation, which we find in the laws of England and Scotland, no distinction is made *, whether the fief is held by a military, or a soccage tenure ; but the lord's interest in the change of the vassal in the one fief is very great, and in the other very small. It was then the interest of the heir alone, equally strong in both cases, which created an equal prohibition in both.

Again, in † the same old laws the restraint upon alienation is almost absolute, where the tenant is in by descent ; but very loose, when he is in by purchase. The heirs of a person seem to have some right, in what has descended to him from his

* Glanv. lib. 7. cap. 1. Reg. Maj. lib. 4. cap. 18, 19, 20, 21.

† Leg. Alfred. No 37. lib. feud. 4. tit. 45. edit. Cujac. Glanv. lib. 7. cap. 1. Reg. Maj. lib. 2. cap. 18, 20.

fore-fathers ; whereas no one can pretend to have a right in what a man has acquired himself : it is the interest of the heir then, which alone created the difference betwixt the one restraint and the other.

But what puts it beyond dispute, that the interest of the heir, and not that of the lord, was sometimes considered in restraining the power of alienation, is, that even the consent of the lord to the alienation of what passed by succession, could not preclude the heir. *Alienatio feudi paterni non valet etiam domini voluntate, nisi agnatis consentientibus*, says the law * of the books of the fiefs.— Lord Coke is therefore under a mistake, when he says †, that though a vassal at common law could not alienate a part of his fee to hold of his lord, yet he could alienate the whole of it. He founds his opinion on this, that in the latter case the fee was not dismembred, and the lord received the whole of his services ; but the mistake arises from attending too much to the interest of the lord, and too little to that of the heir. — Is it possible the law could by implication allow a man in all events to alienate the whole of his fee, at the very time when it expresses the particular events in which he can alienate the whole, or can alienate only a part of it ? When a man is a purchaser, and has no children, he may alienate the whole ; but when he is a purchaser, and has children,

* Lib. feud. 4. tit. 45. edit. Cujac.
pag. 65.

† Coke, institut. 2.

he may alienate only a part, say * the old law books of both kingdoms.

The first step of this alienation of land-property in Great Britain, was the power given to a man, of alienating what he had himself acquired. Over this, and for an obvious reason, he was conceived to have a more extensive right, than over what had been only transmitted to him from his ancestors.

This power is given by implication, in † the books of the fiefs, and ‡ in the Saxon law; but in express words in the laws of Henry I. § The words are : *Acquisitiones suas det cui magis velit, si Bocland autem habeat quam ei parentes sui dederint, non mittat eam, extra cognationem suam.*

At the same time this licence must only be understood to have enabled a man to disappoint his other relations, *cognationes suas*, of the whole of his conquest; but not to disappoint his son of more than a part : for so it is limited in the reign of Henry II. || *Si vero questum tantum habuerit, is qui partem terræ suæ donare voluerit, tunc quidem hoc ei licet, sed non totum questum, quia non potest filium suum hæredem exheredare.* The same was the rule in Scotland at ** the same period.

The alienation of conquest, or lands taken by purchase, paved the way for the alienation of what had come by descent.

* Glanv. lib. 7. cap. 1. Reg. Maj. lib. 2. cap. 27.
feud. 4. tit. 45. edit. Cujac. † Leg. Alfred. No 37.
Hen. 1. No 70. || Glanv. lib. 7. cap. 1.
Maj. lib. 2. cap. 27.

† Lib.
§ Leg.
** Reg.

At first, only a part of this last was allowed to be alienated, and that not *cui velit*, as in purchases, but only on very reasonable motives. Thus the particular instances, as they appear * from Glanville and the *Regiam Majestatem*, in which men were allowed to alienate their heritage, were, in gratitude to a vassal for services done to the lord in war, or to the fief in peace. Secondly, in frank marriage with his own daughter, or the daughter of the feuditary, because this multiplied tenants to the lord; and lastly, in frank almoigne or free alms; the superstition of the times allowing this last for the good of the alienor's soul.

At the time that the law stood thus in military and foccage tenures, the licence of alienation made a full and ample stretch among burgeses.

Thus the law laid down by Glanville and in the *Regiam Majestatem*, permitted the alienation of no more than a part of a purchase, if there were children; but the laws † of the burroughs in Scotland, on the contrary, gave a full power to the burgeses to alienate the whole of his purchase without distinction, whether he had children or not; and to sell, with the observance of certain preferences, whatever had come to him by descent, if he was oppressed with poverty.

It is probable, though we cannot trace it, that the first free voluntary alienation of land in England, arose likewise among trading people; for

* Glanv. lib. 7. cap. 1. Reg. Maj. lib. 2. cap. 18.
Burg. N^o 45.

† Leg.

the holding not being strict in burroughs, it could not in them be of great importance by whom the services were done; add to this, that the extent of the notions of mankind concerning their powers over property, increases with society; and as people living in towns, from their greater numbers, and greater intercourse, are in a more improved state of society than people living in the country, it was natural that the power of alienating land should arise sooner among them, than among the rest of mankind.

The free alienation of land being thus established in burgage tenures; and in other tenures the alienation of purchases in many cases, and that of inheritances in some cases, being allowed, alienation in these other tenures gradually gained ground; and when * Bracton wrote his book, seems to have been fully established. In soccage tenure, the interest of the lord had never been great, and in all tenures the interest of the heir declined; so that in the end lands holden by soccage tenure, came to be freely alienated, both in England and Scotland; and as the strictness of the feudal system yielded to a more moderate temperament, the propensity to alienation even in the military holdings of both nations, grew so great, that in the reign of Henry III. it became requisite to restrain it by law.

This restraint was contained in † a clause of the *Magna Charta*, and was afterwards, in the

* Bracton, lib. 2, cap. 5. sect. 4. lib. 2. cap. 5. sect. 7. lib. 2. cap. 27. sect. 1.

† Mag. Chart. cap. 32.

time * of William the Lion, transplanted into the statutes of Scotland. The words of it were, *Nullus liber homo det, de cætero, amplius alicui, quam ut de residuo terræ possit sufficienter fieri domino feudi, servitium ei debitum.* And this sufficiency which was ordered to be reserved, was by practice explained to be the one half of the feud.

One thing which very much facilitated the progress of alienation, was the practice of subfeuing; for as in subfeus at first, the original vassal remained still liable for the services, and distress might be taken for them on the whole of the land, subinfeudation in those days was scarce accounted an alienation.

The licence of subfeuing the whole fief is granted * in the books of the fiefs. *Similiter nec vassallus feudum sine voluntate domini alienabit, in feudum tamen recte dabit.* But that it should prevail in Great Britain, beyond the bounds which the law prescribed to the power of alienation in the time of the Saxons, or even in that of Henry II. and David I. is incredible; for the interest of the heir would have been as effectually hurt by subfeuing as by alienating: but the interest of the heir, at those periods, in Great Britain, as appears from Glanville, and the *Regiam Majestatem*, was much stronger than that of the heir in Italy, at the period when the books of the fiefs were composed.

* Leg. Will. cap. 31.

† Lib. feud. 4. tit. 38.

The power of subfeuing, however, once introduced, extended itself greatly in the law of Great Britain; and though, in the beginning, the original vassal was bound to the services, and distress might be made for them on the land; yet in process of time, the rear-vassal having possessed his feud long, and held it of another, began to think he had a connection only with that other, and none with the original lord. This persuasion of the rear-vassals gained ground, and thereby the superior lords came in the end to be deprived of their services and emoluments.

To remedy this, and to reconcile the jarring interests of lords and vassals, while these were eager after a power of alienation, and those complained that they were stript of their ancient rights, the statute *Quia Emptores Terrarum* was made in England, in * the reign of Edward I. and transplanted, or rather transcribed into the statute-book of Scotland †, in that of Robert I.

In those statutes it is complained of, that through the practice of subfeuing, the superior lords had been deprived of their escheats, wards and marriages, and it is enacted, in favour of the vassals, that they may alienate the whole, or part of their land, as they please; and in favour of the superior lords, that the lands so alienated shall be held of them, and not of the alienor.

As the mischiefs complained of in the statutes *Quia Emptores Terrarum*, were general, so the

* An. 18. Ed. 1.

† Stat. 2. Rob. 1. cap. 25.

remedy was general too, and was meant to extend to all vassals indiscriminately, to those of the king equally with those of the lords. But some doubts having been raised * in England, whether the king's vassals were within the words of the statute; the king took advantage of those doubts, and asserted his old claim of restraining his own vassals from alienating beyond a certain extent; for this purpose, in the statute † *de Prerogativa Regis*, of Edward II. the clause of *Magna Charta*, before recited, was revived against the king's vassals in capite, and in imitation of this example, the statute of William the Lion was revived in Scotland ‡ by David II.

At the same time there was this great difference in the clause, as it had stood in those ancient, and as it was revived in these latter statutes; that by the former, no vassal whatever could alienate beyond a certain extent, whereas, in the revived English statute by express words, and in the revived Scots statute by interpretation, only the vassals by knights service and ward were restrained, which restraint in Scotland was guarded by the penalty of recognition, or the forfeiture to the lord upon alienation, beyond the extent allowed. The bent in favour of alienation was too strong, for the king to be able to restrain it in any other species of holding, and therefore the vassals by soccage were allowed to alienate as they pleased.

* Standf. de prerog. regis, cap. 7.

† An. 17, Ed. 2, cap. 6.

‡ Stat. Dav. 2, cap. 31.

As this claim of the king was the only exception to the statute *Quia Emptores*, as it was founded only on a doubt upon the statute, and was directly contrary to the prevailing bent of the people towards alienation, so the king was obliged, soon after, to give it up.

This was done by a statute * of Edward III. whereby the king's vassals by knights service, were allowed to alienate as they pleased, on paying a composition in chancery.

These compositions were sometimes dispensed † with, to engage the vassals to attendance in hazardous expeditions ; but except in these singular cases they were paid till the reign of Charles II. when tenures by knights service being abolished, they were abolished with them.

By the fall of these tenures, and of the fines which attended them, the voluntary alienation of land in England, so far as not restrained by private deeds, or particular local customs, was brought to perfection.

In Scotland the consequences of the statute *Quia Emptores*, by no means kept the same course.

The necessary effect of the statute *Quia Emptores*, if it operated at all, was to make feudal land as much the subject of commerce, as if it had been allodial : Now in this view the Scotch had followed too close upon the English statute ; for in a country where the rigour of the feudal

* An. 1. Ed. 3. cap. 12.

† An. 7. Hen. 7. cap. 3.

law was somewhat abated, where, provided the lord had a vassal to do service, it was not of great importance to him who that vassal was; there it was right to allow an unlimited alienation: But in a country where the Feudal System still flourished, and where the lord had a very strong interest in the fief, to give the vassal an unlimited power of alienating, was bestowing upon him a power of giving away what did not belong to himself.

In consequence of those different circumstances, the statute *Quia Emptores* could not be put in execution in Scotland, as it was in England; on the contrary, superiors, according to their interest or caprice, refused to receive those who pretended to enter in virtue of it. In soccage fiefs the vassals subfeued their lands, as formerly, to hold of themselves, and in military fiefs the penalties of recognition, or the forfeiture on the alienation of the half, founded on the statutes of William the Lion, and David II. kept their footing in the law; superiors inferred them from alienation, in spite of the new statute; they continued likewise to infer them from subinfeudation, as before the statute they had been continually attempting to do; and in the whole train of decisions since the court of session has been erected, the statute *Quia Emptores* has never once been set up to elude the recognition of a ward feud, alienated to hold not of the alienor, but of the superior lord.

The statute *Quia Emptores* being thus disregarded, the law of Scotland wavered during a long interval; for when the bar to the alienation of lands held in ward was anew erected, the arts to make this bar of no effect were revived by the vassals.

One art particularly, which had some centuries before been invented in England, and which had been provided against * by a statute of Henry III. was revived; vassals infeoffing their eldest sons, pretended by so doing to elude the penalties of recognition, and the judges supported this device in favour to the vassal.

Another art was that of the vassal granting infeoffments of annualrents, or rent charges, out of their lands, by which, under pretence of the granter's remaining interest in the estate, an attempt was made to elude recognition; but the judges, in favour to the lord. put a stop to this device, and held †, that an infeoffment of annualrent above half of the value of the land, inferred recognition.

To reconcile the jarring interests of lords and their ward vassals, while those disregarded as much as they pleased the statute *Quia Emptores*, nor would admit the alienees to hold of them; and yet inferred recognition from subinfeudation; and these, on the other hand, with the genius of the times, were bent on alienation, the laudable

* An. 52. Hen. 3. cap. 6.
March 15, 1569.

† Balfour against Balfour,

statutes of James * II. and of James † IV. were at last made, encouraging and allowing the kings, lords, prelates, barons, and freeholders, to set their ward lands in feu farm, or by foccage tenure, holding of themselves, without danger of recognition, provided the lands were set at full value: And by interpretation of these statutes, the same permission was extended likewise, to subvassals.

These acts were made and that interpretation complied with from national interests; but some reigns after they were obliged to give way to particular considerations and particular interests: the extension of the permission to subvassals was ‡ discharged in the reign of James VI. and the statutes themselves were repealed § in that of Charles I. at periods when the government of Scotland was a monarchy, controuled by nothing but a most grievous oligarchy, when the king and the nobles, who had their lands under ward, could not bear to see the subjection, under which they thereby held their country, broke through, by the independancy of the foccage tenure, into which their vassals were continually turning their lands. Therefore by statutes they forbade ward holdings to be turned into feu holdings; and still further to prevent the alienation of feu holdings, they often in the charters which they granted, added prohibitions on the vassals to alienate any

* Scots acts, an. 1457. cap. 71.

† Scots acts, an. 1503.

cap. 90, & 91.

‡ Scots acts, an. 16. 6. cap. 12.

§ Scots

acts, an. 1633. cap. 16.

part of their lands ; and to these again they added clauses, subjecting the whole to forfeiture, in case the prohibition was infringed.

A greater independancy of the people, and bent of that people in favour of alienation, joined to a greater moderation in the government, have concurred in our day, to destroy * this penalty of recognition, have removed these prohibitions, and brought to perfection the voluntary alienation of land property in Scotland, so far as it is not restrained by particular conveyances.

The only remaining difference betwixt the laws of England and Scotland, in point of the power of voluntary alienation, (for with regard to the forms of alienating, there are still great differences) is, that men can alienate in England upon their death-beds, in Scotland they cannot.

Perhaps it is no refinement to say, that this law of death-bed was in England, and now is in Scotland, the last remain of the ancient bar against alienation.

When the power of alienating had, by gradual steps extended itself in England, yet still this law of death-bed kept its ground : It is probable the the first departure from it, was by the heirs consenting to the deed of alienation ; this probability is made strong from the authority of Glanville † ; “ Possit tamen hujusmodi donatio in ultima voluntate, alicui facta, ita tenere, si cum consensu hæredis hæret, et ex consensu hæredis confirmare-

* An. 20. Geo. 2.

† Lib. 7. cap. 1.

“ tur ;

“tur;” and stronger still from the authority of * Sir Henry Spellman, the most accurate antiquary that we have, who says, “it came to be at last a matter “of common course for the children as *bæ-
“redes proximi*, for the kinsmen as *bæredes rem-
“tates*, and for the lord as *ultimus hæres*, to con-
“sent to the deed.”

In the time of Bracton and the author of Fleta † Alienation upon death-bed was in general allowed, provided the alienor was *sanæ mentis et bonæ memoriæ*, although *impotens sui et in ægri-
tudine in lecto mortali constitutus*. A statute ‡ of Henry VIII. complains of the abuse which had been made of this toleration, yet allows “all
“wills made forty years before the date of it, to
“be taken and accepted as good and effectual in
“the law, after such fashion, manner, and form,
“as they were commonly taken and used forty
“years before the making of the act.” And in the end § two other statutes of the same prince, allowing the disposal of immoveables by testament made at any time, *etiam in articulo mortis*, rendered the original consent of the heir unnecessary, and gave a sanction to all the other breaches of the law of death-bed.

In Scotland attempts have been made || to support death-bed conveyances, by the consent, and even by the oath of ratification of the heir; these, indeed, the judges have cut down; but they al-

* Spellm. remains.

† Bract. fol. 14. Flet. fol. 181.

‡ 27 Hen. 8. cap. 16.

§ 32 Hen. 8. cap. 1. 34 Hen. 8.

cap. 5.

|| Falconer's decisions, Feb. 27, 1683. Earl of Leven against Montgomery.

low men on death-bed to provide their wives, and to sell, when oppressed by poverty, for payment of their debts : one may dispense with the law of death-bed by reserving to himself a faculty to do so : when a person by marriage-articles makes provision for the children of the marriage, he may on death-bed, divide among the children the subject provided, in what proportions he pleases : and a question * is at present in dependance before the court of sessions, whether rational provisions granted to children upon death-bed, shall be good to affect the land estate of the heir : so that though the law of death-bed still lingers in Scotland, it may probably be lost here in a few ages, as it was lost formerly in England.

S E C T. II.

WITH regard to the involuntary, or legal alienation, which arises from attachment for debt, the progress of it, both natural and feudal, seems to be this.

Involuntary alienation.

The notion of borrowing under a promise of paying, is in general not very natural among a rude people ; their conception of obligation is but weak in any case, and that of their obligation to fidelity still weaker. All uncivilized nations are observed to be cruel and treacherous ; instead then of a promise to repay, or of a written document in evidence of

Attachment of a debtor's land.

* Campbells contra Campbells.

that

that promise, the borrower gives a pledge, as a more solid security.

Thus the old word in the English and Scotch law books, *Namium*, which at present we translate by the word *Distress*, signified anciently from the Saxon, *Pignoris Prehenſio*, the ſeizing or diſtraining of the pledge; and Wilkins *, in his gloſſary, commenting on this word, ſays, *His primis temporibus vade et pignore caveri ſolebat; hæc illi ped ⁊ boph vocant; nos (qui aliquam ejus rei teneamus umbram) vadios et ſalvos plegios nominamus.*

From † the *Regiam Majeſtatem* and Glanville, it appears, that in conſequence of prior agreements betwixt the parties, this pledge, upon failure of payment, either remained with the creditor, or on application to the judge, was ſold by his order; and it is not improbable, that at that time, no moveables, unleſs ſo pledged, could be ſold for debt; nor even when pledged could they be ſold, till after a competent time, and delay of payment; for ſo it is laid down by ‡ Glanville and in the *Regiam Majeſtatem*: And a ſtatute of § Robert I. made at a time when even moveables not pledged could be ſold for debt, declares, that even then they could not be ſold for forty days after the attachment. Before theſe days were elapſed, they were kept rather as a ſecurity for the debt, till the debtor ſtill delaying to pay, they were employed to extinguiſh it.

* Willk. gloſſ. voce Nyman Skeen, voce Namare.
Maj. lib. 3. cap. 3. Glanv. lib. 10. cap. 6.
§ Rob. 1. Stat. 2. cap. 11.

† Reg.
‡ Loc. cit.

The progress of the attachment of immoveables is the same. * In the law of the books of the fiefs they could not be attached for debt; nor could they be attached by the Saxon law; nor for several reigns after that of William the Conqueror; nor in the time of Glanville: On the contrary †, the only writs of execution at common law in England, were the *fi. i. facias* on the goods and chattels, and the *levari facias* to levy the debt or damages on the lands and chattels; neither is there the least hint of such attachment in the Scotch *Regiam Majestatem*, or the Scotch *Quoniam Attahamenta*: although in this last the method of attaching moveables for debt ‡ is most exactly described, even the words of the brief, the duty of the sheriff, the proof of the debt, the sale, or if no body will buy, the appretiation; yet the attachment of immoveables is not mentioned at all.

Nor at these periods could the law, unless with an exception to be afterwards mentioned, be possibly otherwise: the limited notions of power over property, added to the interest of the lord against bringing in any vassal who was a stranger to him, were insuperable bars to any further attachment.

It is true, by the *Regiam Majestatem*, lib. 3. cap. 5. and Glanville, lib. 10. cap. 8. it appears, that land might be pledged for debt; and from the same passages, compared with cap. 3. of the

* Feud lib. 2. tit. 52.
 † Quon. attach. cap. 49.

† Bacon, abridgm. tit. execution.

first authority, and cap. 6. of the other, it appears, that in consequence of bargains concerning such pledging of land; a practice had crept in, that the principal sum not being paid, the land either remained with the creditor, or on application to the judge, was sold by him. But some of those cases being in consequence of agreements, were branches rather of voluntary than involuntary alienation, and they belonged more to the rules of private transactions, than of public law: And further, as no right of pledge was supported by the king's courts without possession; *Si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet, nec warrantizare*; * the possessor of the land pledged, seemed in this circumstantiated state to have acquired a connection with, and power over it, which facilitated the notion of his retaining it, although the attachment of land by other creditors in general, who were not already in possession, was, it is certain, utterly unknown.

I say, by other creditors in general; for though in the reign of Henry III. † we soon after find, that the king, and the surety for the king's debtor purging his debt to the king, could enter upon the land for their debt, and keep it till the debt was paid, yet this was a preference special to the king; and as the surety had paid off the debt to the king, he seemed to come in his

* Glanv. lib. 10. cap. 8. Reg. Maj. lib. 3. cap. 4. Chart. cap. 8. Coke 2. inst. 19. Bacon, voce execution.

† Mag.

place,

place, and to have a right to enjoy his privileges.

But as the voluntary alienation of land was first freely introduced among trading people in boroughs, so the involuntary alienation of it was first freely introduced among the same people in the same places.

Thus in Scotland, in the laws of the boroughs, which were composed in the reign of David I. * the method of attaching and selling land for debt, is compleatly laid down. By those laws, the creditor might enter upon the lands of his debtor, and after certain delays sell them: The only restraint this attachment admitted, was a right of redemption given to the relations of the debtor †; a right derived from the most ancient law, and at that time not totally eradicated even in boroughs.

This attachment thus taking its rise in the laws of the boroughs, and among trading men, was afterwards extended to all the subjects indiscriminately; so that by a statute in the reign of ‡ Alexander II. upon application of the creditor, it became the duty of the sheriff to advertise the debtor to sell his land in fifteen days, which if the debtor did not do, the sheriff was impowered to sell it himself. And that this statute was put in execution, appears from § the records of chancery, prior to the alteration of the law in the year 1469, to be afterwards mentioned.

* Leg. Burg. cap. 94. & 95. † Leg. Burg. cap. 45. & 115.
Kames hist. notes, N° 9. ‡ Stat. Alex. 2. cap. 24. § Record of charters, lib. 4. N° 49. July 22, 1450. Charta Confirmationis Gilberti Menzies.

In the same manner it was *, that the statute *de mercatoribus*, introduced the benefit of the statute merchant first into England in the 13th year of Edward I. By that statute, which was transplanted afterwards likewise † into Scotland, the merchant creditor was allowed, upon failure of payment, to take possession of the whole of his debtor's land, till he was paid of his debt: in that land too he was infeofed by the law; and upon the same plan of attachment with this statute merchant, the statute staple ‡ was two reigns after invented.

It is true, that the same year in which the statute merchant was introduced, execution upon judgments, and common cognizances §, by the writ of *elegit*, which was common to all the subjects, was likewise introduced. But the difference of execution given upon this writ, and that given upon the statute merchant, proves a very wide difference in the attachment allowed among merchants, and that allowed among the other subjects. The security by statute merchant, gave possession of the whole of the land to the creditor; but the writ of *elegit* gave him possession of no more than a half: Originally men could not alienate at all, afterwards they were allowed to alienate, but not beyond the half of the feud: now this principle, or rather rule, was strong at the time the writ of *elegit* was invented, and the statute *Quia Emptores* had not yet been

* An. 13. Ed. 1. Stat. merc.

† Rob. 1. Stat. 2. cap. 19.

‡ An. 27. Ed. 3. cap. 9.

§ An. 13. Ed. 1. cap. 18.

introduced; therefore whatever stretches might be found necessary from the circumstances of merchandize, yet with regard to the kingdom in general, a small deviation only was made from the common law, and the *elegit* was permitted to affect no more by the operation of law, than a man was supposed capable of alienating by his own deed.

As the feudal law relaxed of its severity, and the commerce of land grew more into use, the attachment of land by statute merchant, and statute staple, was allowed to all the subjects in general. The statute merchant became first by practice, and afterwards by a statute of * Henry VIII. one of the common assurances of the kingdom: And though the same statute of Henry VIII. confined the benefit of the statute staple within its ancient bounds, so as † to operate only for behoof of the merchants of the staple, and only for debts on the sale of merchandize brought to the staple; yet it framed a new sort of security, which all the subjects might use. This security is known by the name of a recognizance on 23 H. VIII. cap. 6. and in it the same process, execution, and advantage, in every respect, takes place, as in the statute staple.

But in later times, when land came to be absolutely in commerce, this attachment was thought insufficient; and therefore the act of the ‡ 13th of queen Elizabeth, and the subsequent acts con-

* An. 23. Hen. 8. cap. 6.

† Bacon, voce execution (B.)

‡ An. 13. Eliz. cap. 7.

cerning bankrupts, established a compleat attachment of such lands as belonged to the persons specified in those acts: Instead of a half, those statutes laid the whole of the land open to the creditor, and instead of a possession, which was all he had by the *elegit*, or statute merchant, or statute staple, they gave him the means of procuring a sale of that whole for the payment of his debt.

On these statutes of bankrupts, it is well worthy notice, as confirming the principles already laid open, that although the statute * of Elizabeth, and that of † the first of James I. related only to people dealing in merchandize, yet they were extended afterwards, by degrees, to many others of the subjects. By the ‡ 21st of James I. they were extended to such as were scriveners by trade. By the § 5th of George II. they were extended to bankers, brokers and factors. By interpretation of the judges, they were extended further || to many different classes of tradesmen and mechanicks; and though they do not hitherto relate to the rest of the subjects, yet future generations will see them extended to the whole. The compleat attachment of land now established among merchants, will, in the end, by a train of causes and effects, as absolute in the political, as in the natural world, affect the property of all landed men whatever.

* An. 13. Eliz. cap. 7.

† An. 21. Jam. 1. cap. 19.

|| Bacon abridgm. voce bankrupt (A.)

† An. 1. Jam. 1. cap. 15.

§ An. 5. Geo. 2. cap. 30.

When a progress is uniform in its movements, and constant in its direction, there is no very great degree of arrogance in prophesying where it will end.

In observing this progress of legal attachment in England and Scotland, it will readily occur, as a matter of surprize, that our ancestors, in the execution, by the act of Alexander II. went before their neighbours in England, who from their situation should rather have gone before them.

The following history of the variation in our legal execution, consequent upon this act, will show the effects of this hasty step.

In England, those who entered by the *elegit*, statute merchant, &c. entered rather to the possession than to the property, seeing the original proprietor continued for ever to have a right of reversion: Further, the statute *Quia Emptores* soon after had effect in that kingdom, therefore the entry of the attacher was easy: In Scotland, on the contrary, by the statute of Alexander II. the attacher became absolute proprietor, and yet the law was so improvident, as to give no satisfaction to the lord for entering him: The statute of *Quia Emptores* was indeed afterwards made; but that went soon into disuse; and yet the lord remained still bound to receive the attacher without fee or reward: *Sine obstaculo aut questione aliquali*, says the law of Alexander.

Upon the refusal of the lords to enter those attachers, letters of four forms were directed against them; but then the lord, in right of his

property in the ground, claimed a privilege to pay off the debtor, when he was attaching the land, and to take it to himself.

Though this claim was sustained, and even sustained in the statute itself, yet still the law produced great inconveniences to the creditor, to the debtor, to the lord.—To the creditor; for if no one bought the land which the sheriff set to sale, the creditor could not be paid.—To the debtor; for if he had not his money ready, and the land was attached for less than its value, the lord, by stepping in, and paying off the debt, might possess himself of the land, against both debtor and creditor.—To the lord; for if the land was attached for its value, or if he had not money to clear it off when attached below its value, he was forced to lose his old vassal, and get one, perhaps an enemy to him and his interest.

To these three evils, three remedies were applied, by the * act of 1469. In the first place, by that statute, if no purchaser appeared, a certain part of the land was appraised, and at the appraised value given to the creditor: Next, a right of redemption was given to the debtor at any time within seven years: And lastly, the superior was not obliged to admit the buyer or creditor without a gift to himself of a whole year's rent of the lands; at the same time, his ancient right of pre-emption was secured to him; but subject

* 36 Act, 1469.—

still,

still, by interpretation of the judges, within the seven years, to the redemption of the debtor.

These expedients indeed, cured some of the present evils ; but still the source of the evil remained : As we followed the English too closely, in attempting to allow the free voluntary alienation of land by the statute *Quia Emptores* ; so we made still a greater mistake in domestick policy, when we ran before them, and allowed the free and unlimited attachment of land, even of land held by ward, for debt, at a time, when the strong notion of the ancient right to the land itself in the superior, gave to the superior a claim to interest himself in that attachment ; when there was not such a degree of commerce in the country, as made so great a fluctuation necessary ; and when the uncertainty, and imperfection, and weakness of the laws, joined to the dependance of the courts upon the great men, gave an opportunity to these last, of getting almost all the lands in the country into their possession, under the cover of the laws which gave attachment for debt.

The following was one of these shameful devices : Originally it was the sheriff of the county, who, in consequence of application made by the debtor to the king, attached and apprised the land, in the same manner that the sheriff apprised by the *elegit* in England ; but as the lands of a debtor lay sometimes under different jurisdictions, and the sheriff could attach only lands under his own jurisdiction, and as the trouble and expence of getting an apprising from every parti-

cular sheriff, was complained of, it had crept into practice, on the establishment of the court of daily council, and of the court of council and session, (the judges of which courts came into the king's place, as the clerks to the signet were deemed the king's clerks) that the lords of these courts, instead of the order of the king, or the precept of the sheriff, granted letters, or a writ of apprising, under the signet, written by the clerks of it, directed not to a particular sheriff by name, but in general to sheriffs in that part, or *pro hac vice*, for whose names a blank was left in the letters. These letters being directed to messengers, the creditor who got them, generally filled up the blank for the names of the sheriffs, with the name of the messenger who was thus constituted sheriff in that part, or *pro hac vice*; and as such became the judge empowered to comprise the lands. Messengers in this manner being made judges in affairs of such importance, those who were cunning in the law, did, in parts of the country where law could have force, and great men, who had always the counsel of such cunning men at command, did, in parts of the country where they themselves could give to the law force, make the following use of it: They either lent small sums upon great estates, or bought up small debts upon them; they then applied to the king's courts for a writ of apprising, which was granted without examination, and the execution of it left to messengers,

sengers, sheriffs *pro hac vice*. These messengers being named by the compriser, resolved in every thing to consult his interest ; or though they had not been so resolved, yet residing at Edinburgh, and not being obliged by the letters to go to the lands, they could not know the value of them ; or if they did, it was only by such a proof, as the compriser himself thought proper to bring. In consequence of these practices, large quantities of the debtor's land were given by the messengers to comprisers, for very small debts ; nay, in the end they came to give without scruple the whole of his land for such debts : Nor had the debtor even the consolation to hope, that the rents of these lands would pay off the debt ; for the creditor getting possession of the estate, and the circumstances thereof being by him kept secret, he was accountable for none of his intromissions : he kept his fund of payment in his own hands, and yet he never was paid ; for seven years he pretended it was a security, and after that the law made it to him a real property. From these legal fetches flowed national misery ; debtors grown desperate by such crying injustice, either opposed the law by force, or sold their right to some great man who could do so. The superior, if he was not tempted by the offer of a year's rent, (which however he generally was, and for that reason appraisings ran on the faster) to lose his old vassal, refused to enter the new one ; the new one fell upon a contrivance to apply to the superior of that superior ; and if he entered him,

a quar-

a quarrel ensued not only between debtor and creditor, but between mediate and immediate superior. These things, together with other causes, filled the land with wars, which were rather those of house against house than of party against party, and made this people a wonder to all neighbouring nations.

As there is no record of apprisings, prior to the year 1636, it is impossible to prove this deduction from that record; but as the deduction is agreed upon by our ancient lawyers, so there is sufficient evidence of it in the record of the king's charters. By these it appears, that originally * the sheriff comprised; that about thirty years after the statute of 1469, the letters † were directed to, and executed by messengers, who however for some time performed their duty, either upon the land, or at the head-burgh of the shire in which the lands lay, with the same exactness that the sheriffs had done. In the year 1528, the first ‡ dispensation was given for holding the court of apprising at Edinburgh, instead of holding it where the lands lay; the reason given in the charter is, that the lands lay in different shires. Soon after this, many instances appear §, of dispensations granted even where the lands of the debtor lay in one shire. But still, notwithstanding these two last altera-

* Record of charters, lib. 5. N° 6. Dec. 11. 1481. chart. Thomæ Grundiston—lib. 25. No 191. May 22. 1530. chart. Gulielmi Hamilton. † Record of charters, lib. 12. N° 241. Nov. 8. 1491. ‡ Ibid. lib. 24. N° 219. § Ibid. lib. 25. N° 50. 1528.

tions, the apprisings were for some time led * by proof of the value, and with the same solemnities with which the apprising by the sheriffs had been led. From this period, till the year 1608, there appear several † charters on apprisings, which had passed without specifying the value of the lands; but although in these it may be doubtful whether the debt did not exceed the value of the land, yet, after ‡ that year, instances of general apprisings become numberless and uncontroverted, and lands are not only comprised without valuation, but the largest estates are comprised for the most insignificant sums.

Such appears the progress of apprisings from our records, and the effects of that progress upon the manners of our people are but too well vouched in the histories of our families and of our manners.

The king, the people, the judges, saw those effects; they saw too the cause of them, and in their several capacities endeavoured to soften both. The judges §, as appears by the decisions of those days, named advocates in affairs of consequence, to be assessors to the messengers; they discharged courts of apprising to be held any where, but in the county where the lands lay, unless for special causes shown to themselves.

* Ibid. lib. 24. N^o 219. † Ibid. lib. 34. N^o 485. 1576. chart. ap. Adami Wauchop. lib. 36. N^o 13. 1592. chart. ap. Georgii Dundas. lib. 44. N^o 351. 1607. chart. ap. Alexandri Lauder. ‡ Chancery records, lib. 1. fol. 16. 1608. Feb. 9. lib. 1. fol. 2. 1607. Dec. 5. lib. 1. fol. 168. 1614. Jan. 25. lib. 1. fol. 195. 1613. Dec. 7. § Dict. decis. tit. adjudication & apprising.

They prevented the legals from expiring, by taking advantage of every flaw in the comprisings; as on the other hand, they discouraged all attempts to prove flaws in the orders of redemption; and the legislature, enacted by the act* of 1621, that if the land comprised yielded more than the interest of the sum comprised for, the superplus should be imputed in payment of the principal sum.

But still these corrections were not sufficient; for, under pretence of obeying this act, and of imputing the surplus of his annual rent, to the payment of his principal sum, the creditor still kept possession of the whole of the estate; after which, it was difficult to prove the intromissions upon him, and, at any rate, a proof of them could only be made good by an intricate and tedious law-suit.

To remedy this, the act † of 1661 was made, which enacted, that it should be in the power of the debtor, to offer security to the creditor, for his annual rent, instead of allowing him to possess any of the land; and that it should be referred to the lords of session, to determine, whether the creditor might safely accept the security offered, or should be allowed possession of the land to a certain extent; at the same time, that extent was limited, by the statute, to what produced exactly the annual rent of the principal sum. Further, by the same statute it was enact-

* Act, 6, 1621.

† Act 62, 1661.

ed, that the time of the legal, which was formerly seven years, should now be extended to ten; all of which regulations were in favour of the debtor. It is further to be observed, that by interpretation of this statute, a charge to the superior became sufficient to establish the right of the creditor in the estate; whereby the creditor, not asking infeoffment, nor paying his entry during the legal, the discontent of the superior could not be dangerous to him, on the one hand, nor the eagerness of the superior to admit him, tempting to him, on the other.

By these last alterations, apprisings were changed from being the instruments of payment of debt, to be only a security for it. This the lords of session had been for some time aiming at, by doing every thing they could, to prevent the legals from expiring; the statute lengthened the time of expiration, and put it in the power of the debtor to remain in the possession of his land.

But this alteration in the nature of apprisings, bred discontent in many; for people had lent their money, in expectation of getting it back when they pleased, or at least of getting possession of land of equal value; whereas they might now be kept from both, by an offer of security for the interest of their money, and that too, not for seven years, but for ten. The clamours raised on this account, made the introduction of adjudications, by the act of * 1672, necessary, which

* Act 19. 1672.

being judicial sales, subject to redemption within five years, would, it was thought, please all parties, and solve all objections: And indeed, most of the inconveniencies of the former execution, were prevented by this one. Anciently messengers had been judges in the attachment, now the lords of session were become such; formerly, though the act of 1661, restricted the creditor to an annualrent, futeable to his principal sum, during the legal, yet on the expiration of that legal, by a saving clause in the statute, he might, if the debt was not paid, possess himself of the whole estate he had apprifed; now only a proportional part of the estate was laid open to him at all: formerly there was room for lawsuits, in accounting for intromissions, now the creditor was made subject to no count and reckoning: formerly the legal being ten years, the land was not only not improved, but was totally neglected; because neither the debtor nor the creditor knew to whom it was to belong: but this uncertainty, by the present statute, was to remain no longer than for five years. At the same time, as it would have been extremely hard, to have introduced so many things in favour of the debtor, unless some additional care had likewise been taken of the creditor; therefore, in consideration that the creditor was obliged to ly so long as five years out of his money, and to take land in place of it in the end, a portion of land equivalent to a fifth part of his sum, was given to him, to be kept with the rest, in case his money was not repaid within

the

the five years. Further, in order to give him an absolute security in the land which he got, the debtor was ordained to compleat this judicial sale, by delivering to him the title deeds of the lands; and in case the debtor neglected or refused to do so, the creditor was allowed to apprise as formerly; in which event all the mischiefs of former apprisings were allowed to fall on the debtor disobeying the law.

These amendments and provisions were thought sufficient by the legislature, and lawyers of those days; but all that the wisdom and justice of parliaments can do, added to the foresight and precaution of lawyers, is often, only to apply remedies which future lawyers will break through, and which future parliaments must again remedy. Hard fate of law, in which, from a continual fluctuation of circumstances, the best laws are but remedies to bad ones; and all that posterity can hope for, is, to amend their forefathers defects, and in doing so, to leave defects for others to amend!

The original error of allowing the free attachment of land for debt, at a period when the genius and circumstances of the people were not ripe for it, was felt, when the law itself was forgot: for the genius of the people not complying with that free attachment, had brought in the right of redemption in favour of the debtor, and that right ran through all the future amendments of the law, to poison them, to flatter the debtor with false hopes of saving a ruined estate, and to

make the creditor uncertain what was the nature of his own fortune. If the legislature in the 1672, at a period when the genius and circumstances of the people were ripe for an almost compleat attachment of land-property, had given a right to the creditor to sell the land, after a competent interval; or if it could not be sold, to take a portion to himself, the remedy would have been effectual: but the effects of old laws are not soon to be rooted out, and the act of 1672 was tainted with these effects; consequently it's remedies were unavailing.

The error of the law lay here; that instead of it's being contrived, so as to make the creditor execute it, it was left to be executed by the debtor, and a penalty was inflicted upon him for non-compliance; but penalties against a wilful debtor, are at any rate vain, and in this special case the penalty was too weak: for to invite a man to consent to the sale of his estate, by taking from him a fifth part more than he owed, and by making him lose all hopes of recovering it after five years, was surely no very great bribe; as on the other hand, to terrify a man who was already desperate, by allowing him to torment his creditor with law-suits, on account of intromissions, and to preserve his own right to the estate for ten years, was surely no very great penalty. Debtors saw, and felt the alternative, and acted accordingly: they almost universally neglected the act, they produced not the title deeds, they compleated not the sale; or if
a very

a very few did obey the law, they were only men, whose estates were so overburdened, that there was no room for the fifth part more, which the statute had provided in favour of the creditor.

These mischievous effects were seen by the legislature, but their original cause was not seen; therefore they were remedied only by halves: They were so far remedied, that by the act * of 1681, the right of redemption of the debtor was taken away, and any one real creditor could apply to the court of session for sale of the bankrupt estate: but they were so far not remedied, that within the legal it was still necessary to carry along the consent of the debtor; a consent, which was seldom obtained, and which, no legislature making allowances for human nature, ought in general to have expected.

Then came the act of † 1690, which impowered the court of session, on the petition of any one real creditor, to sell the bankrupt estate; or on failure of a purchaser, to divide it amongst the creditors; both of which they were impowered to do, even within the legal, and though the debtor refused his consent.

Another ‡ statute a few years after, together with the later § act of sederunt intended to make that statute effectual, gave, notwithstanding the concealment of the title deeds of the lands, a total security to the purchaser; a security made such,

* Act 17. 1681. † Act 20. 1690. ‡ Act 6. 1695.
§ Act sederunt, 1711. Mar. 23.

by the interpretation of the judges, as perhaps, the title deeds themselves, if produced, could not have afforded. For on the 21st of June 1720, in the case Chalmers against Myretoun, the lords refused, after decree of sale, to hear a party plead, that the sale had been carried on for the debts of one who was only life-renter, and by collusion with the creditors, at a time when he, the party, being an infant, was proprietor of the estate.

At the same time, it will be remembred, that these two last statutes relate only to the attachment of bankrupt estates, and therefore, with regard to the attachment of other estates, the law still remains as imperfect as it did upon the statute of 1672.

An observation occurs before this deduction can be quitted. By the statute of 1469, the superior was allowed to pay off the debt, and to take the land to himself: this was natural at a period when the superior's interest was strong in the fief. The statutes of 1690 and 1695, neither reserve to, nor take from the superior, this his ancient right; but the judges in interpreting these statutes * have found, that this right of preference is lost: this is equally natural in an age when the superior's interest in the fief is become, except in matters of form, little more than a name.

* Fountainhall, Dec. 17, 1695. Kennedy contra Earl Cassill's.

Such is the progress of the law of England and Scotland, on the attachment of land for the debt of the debtor himself. From that progress it will readily occur, that if there was so much difficulty in bringing in the attachment of the lands of the debtor himself, there must have been much more difficulty in bringing in the attachment of land in the person of the heir for the debt of his ancestor: The heir had not contracted the debt, therefore according to the law of nature he seemed free; the fief was bound for the services of the lord, therefore it appeared agreeable to the laws of fiefs, that the heir should have the fief free of burdens, in order to enable him to do those services. And accordingly * it is certain, that originally at common law in Britain, the heir was not bound for the debts of his ancestor.

It has been seen, that the voluntary alienation of land, and the attachment of it in the debtor's hand for his own debt, took place, both of them, at first, among trading people: On the same plan of analogy, the attachment of land in the hands of the heir for the debt of his ancestor also took place first among the same people, and from them has been extended to the rest of the nation. By the statute merchant of † Edward the 1st, it was declared, that "If the debtor die, the merchant shall have possession of his lands, until he hath levied his debt." In

* Bacon voce heir and ancestor, (F.)

† An. 13. Ed. 1.

Scotland the same thing is laid down in a statute of * Robert the 1st, relating to merchants ; and more fully in the 94th law of the boroughs.

The over-haste of the Scots nation, in going before the English, in the attachment of land for the debt of a debtor, by the 24th act of Alexander the 2d ; and for the debt of the ancestor, by the 94th law of the boroughs, at a time when the interests of the lord and vassal ran too much into each other, to admit those attachments, created very great embarrassments in the law of Scotland, on an emergency, which in this last deduction has not been mentioned. The emergency I mean, is, when a debtor died, whose heir would not make title to his estate ; in that case, it was difficult to apprehend, how the creditor, consistently with the strict feudal notions, could reach the estate : It was not in the debtor, for he was dead ; it was not in the heir, for he had not entered ; it was not in the lord, for he had only the superiority. This difficulty could not occur in the law of England, because, originally, if the heir possessed, his possession made him a title ; and if the lord possessed, he was understood to possess for the heir ; and afterwards † the statute of uses joining constantly the property to the right, made the estate as much the property of the heir, as if he had been admitted by the superior ; but in the law of Scotland it is certain, that for a long time, creditors could not reach an estate in this situation at all.

* Rob. 1. stat. 2. cap. 19.

† An. 27. H. 8. cap. 10.

To remedy this, the act * of 1540 was passed, which made a charge by the creditor, to the heir, to enter, equivalent to an entry. After that, the estate was deemed to be in the heir, and was attached as so vested.

But to elude this, heirs gave into court formal renunciations of all connexion with the inheritance; after which, the estate could not be attached as belonging to the heir; neither could it be attached in the hands of the superior who had not contracted the debt, and to whom, by † the renunciation of the heir, added to his own radical right, it fell simply to return, disburthened of debts to which himself had not consented.

The injustice of this elusion was too crying, not to require a remedy; and therefore the judges of the court of session interposed; and without statute, without even a feudal analogy to support them, introduced the adjudications on decreets *cognitionis causa*; that is to say, they allowed an adjudication against the *hereditas jacens*, as if it had still been the property of the dead person. Craig ‡ says this expedient had been contrived only lately before his time. “Erat sane hæc adjudicationis formula, majoribus nostris incognita, et quodammodo necessitate, a recentioribus, introducta, ad eorum bonorum dominium in creditorem transferendum, quæ, alioqui, commode, transferri non possunt, aut appretiari.”

* Scots acts, an. 1540. cap. 106.
n. 1.

† Kaims hist. notes

‡ Craig, lib. 3. dieg. 2. N° 23.

The introduction of the adjudication *cognitivis causa*, gave execution against the estate in which the ancestor had been vested ; but then another difficulty occurred, with respect to the creditors of an heir apparent, who had during his life continued to possess the estate, but had made up no title to it : If the next heir passed him by, and served to another ancestor, the estate could not be attached, as the estate of the first heir, for he had never been vested in it ; neither could it be attached in the hands of the next heir, because the next heir did not represent him.

This gave great room for the frauds of heirs ; the interposition of the legislature became necessary ; and therefore, by the act of * 1695, it was ordained, that if an apparent heir should possess for three years, the next heir passing him by, and connecting himself by service, or by adjudication on his own trust bond, to an ancestor vested in the estate, should be liable to the value of the estate ; for the onerous deeds of the interjected heir whom he passed.

The interpretation of this statute produced a controversy in the law of Scotland, which at the distance of half a century, is perhaps, yet undecided.

The words of the statute, it is observable, subject the second heir, only in the event “ of his “ passing by the first heir, and connecting himself “ by service, or trust adjudication, with an an-

* 1695. cap. 24.

“cestor vested :” now the second heir, to withdraw himself from the words of the statute, did not connect himself at all with an ancestor vested ; but continued to possess the estate merely on his title of apparenacy. The question arose, was this heir subject to the onerous deeds of the first, or interjected heir three years in possession ?

On the one hand, it was pleaded for the heir, that the statute in question being correctory of the common law, admits only a strict interpretation, and ought not to be extended to cases beyond the letter of it. On the other hand, it was pleaded for the creditors, that when there is a defect in the common law with respect to the prevention of fraud, and a remedy is provided by a correctory statute, the statute ought to be extended to every fraud that falls within the purview and reason of it.

The judges, by * two successive decisions, gave sanction to the former of these doctrines.

Particular remedies were however applied without doors ; for, moved by the favour of the creditors claim, and by the fraud of heirs sheltering themselves under the defect of the law, † the barons of exchequer, and likewise many subject superiors, made gifts of the incident of non-entry to the creditors ; by which they could force the heir, either to enter, or to lose all benefit of not entering.

* Feb. 20. 1736. *Lady Rater*. June 1742. *Lo. Barnif.* † *Bank.* lib. 3. tit. 5. p. 106.

The house of peers, on an appeal concerning * the estate of Kinminity, seemed willing to apply a more general remedy, by giving extent to the interpretation of the statute : in that case the first heir had possessed three years without making up title ; the creditors had charged the next heir, who was a minor, to enter ; and on that charge adjudged the estate as his, upon the act of 1540 ; if the next heir had renounced, he had avoided † the statute of 1540, which did not take place if the heir renounced ; and must have fallen under the doubt of the statute in question, by not making up a title at all ; for which reason, he brought a reduction on the heads of minority and lesion, of the execution which had been pursued against him ; and pleaded, that his renunciation being admitted, the estate could not be touched, because he had connected himself with it, neither by service, nor trust adjudication. The lords of session found, that the estate could not be reached by the creditors ; but the house of peers, in bar to the fraud of heirs, reversed the decree.

A few years after, in the case of the estate ‡ of Pronfy, the abstract question occurred again. An apparent heir, three years in possession, gave a jointure to his wife by marriage-articles, but made up no title to the estate ; the next heir refused to make up title, and refused to pay the widow her jointure ; and pleaded, by not passing

* Nov. 22. 1748. Sutherland against his father's creditors.
 † An. 1540. cap. 106. ‡ 4 Collec. Isobella Grant against Sutherland. Dec. 12. 1754.

by the first heir, that he fell not under the statute of 1695 : The court of session adhered to the letter of the statute, and to the train of their decisions, and sustained his refusal ; and perhaps, influenced by the uniform train of deciding the question in Scotland, and by the steadiness of the judges there, the house of lords gave their assent to the decree.

But whether in future times, a statute calculated to obviate frauds, will be allowed to give sanction to a very great fraud ; and whether a second heir making up no title at all to the estate, will be allowed to be in a better condition, than a second heir making up titles fairly to it, may perhaps, with justice, be doubted.

Such is the progress of the involuntary alienation of land property, both in England and in Scotland. Upon a review of this deduction, it is no pleasing reflection, to observe, after the consummation of centuries, the law of England labouring under this defect, that in common cases, the creditor gets a distant, and not immediate payment, the possession, but not the property of his debtor's land ; and the law of Scotland labouring under this absurdity, that if a debtor having lands is in fact insolvent, his creditors get direct payment ; but if he is able to pay, they do not. The first of these assertions seems strange of so commercial a nation as the English, and the other seems paradoxical in any nation ; yet both are true : In England, if a man is not of a certain denomination to come under the statutes of trad-

ing bankrupts, his creditors only get, according to the nature of their debts, the benefit of the *elegit*, or of the statutes merchant or staple; that is, they get the possession, in some cases, of the half, and in other cases, of the whole of their debtor's land; but in no case, the property of it. Again, in Scotland, if a debtor is in good circumstances, a creditor, by running an adjudication against his estate, gets not his money; he gets indeed land, but that land may be redeemed from him in a certain number of years; and thus he gets only a security for, or at most an indirect payment of, his debt; on the other hand, if the debtor is in fact insolvent, his lands are brought directly to a sale before the lords of session, and the creditor gets immediate payment.

The feudal law carries with it not only a system of private rights, which swallow up all others, wherever it comes; it involves too, in giving effect to those rights, a system of forms, which remain, even when the original rights are no more. Nor is this all, for some of these rights, by the force which each gave once to the other, remain, even when most of the forms have perished too; but the day will probably come, when all land becoming allodial, and the more compleat and easy attachment of it becoming necessary, the rule of the Roman emperor laid down in * the *Pandects*, and made when the feudal relations, and the bar to the alienation of land property consequent on them, were un-

* L. 15, D. de re judicata 2 & 3.

known, will be the law of the world. By that law it was ordered, that a portion of the moveables equivalent to the debt, should first be sold; but if these did not suffice, that an equivalent portion of the land should be sold; and if no purchaser appeared, that the subject offered to sale, should become the property for ever of the creditor. “*Primo quidem, res mobiles animales pignori capi jubent, mox distrahi; quarum præ-*”
 “*tium si suffecerit, bene est; si non suffecerit,*”
 “*etiam soli pignora capi jubent, & distrahi.*”
 “*Quod si nulla moventia sint, a pignoribus soli*”
 “*initium faciunt; si pignora quæ capta sunt,*”
 “*emptorem non inveniant, rescriptum est, ut ad-*”
 “*dicantur ipsi, cui quis condemnatus est.*”

S E C T. III.

FROM the foregoing deductions of *Alienation* the alienation of land property, by *by will.* immediate deed of party, and by attachment of law, it is plain, that it would be very long before men could have a notion in the feudal law, or in any law, of the third branch of alienation; to wit, of that alienation which is to take effect, only after the death of the grantor.

When a man has bestowed much cost and labour upon a subject, he reckons it hard, that he should not have the complete enjoyment of it, and consequently the voluntary alienation of it during his life; but his enjoyment ceasing after death, the liberty of alienating at a time when

he can no longer enjoy, is, to a rude people, no very natural conception.

The introduction of money which buys all things, and in consequence of that, the favour due to creditors, who have lent their money to a possessor of land, brings in the necessity of legal alienation for the payment of what has been thus lent: But the same favour does not intervene, for an alienation by testament, which depends solely upon the will of a person who is now forgot, and against which, the favour, attending the heir of blood, is a bar.

Hence, in the progress of society, those first and second species of alienations very much precede this, of which we are now treating; and in many of the instances given in this chapter, men could alienate during their lives, who yet could not alienate so as to take effect after their deaths.

At first, this power of alienation is so little thought of, that men do not imagine they have a power of conveying even moveables, by testament.

Thus, before the time * of Solon, the Athenians could not make testaments: nor could the Romans † before the time of the twelve tables, and even then the use of testaments came not in, by the natural course of things, but was borrowed from the Greeks, and was the act of the legislature rather than of the people. Tacitus testifies to the same effect, of the limited idea of property among the Germans of his time. His words are,

* Plut. in vita Solonis.
tabulae.

† Heinec. Roman antiq. & 12

Hæredes successoresque sui cuique liberi, & nullum testamentum; si liberi non sint, proximus gradus in possessione, fratres, patrui, avunculi.

Afterwards, men get a notion of making testaments, but only of their moveables, and in some nations, of a part of these moveables only. Thus * in the *regiam majestatem*, testaments of moveables are permitted, but they are confined to one third of the moveables only, called the dead's part. The same was the ancient law in England, as we learn from † Glanville and † Bracton; and although from the favour to power over property, this limitation wore out, in the other parts of that kingdom, yet till the statute of George § the first enabling men to devise in spite of all special customs whatever, it remained the law in the province of York, and the city of London. In Scotland, at this day, where our notions of powers over property are not altogether so extensive, it remains still the law of the land.

The notion of a power over moveables even beyond the grave, once introduced, made way for a notion of the same power over immoveables; yet still, in giving effect to this last power, people were obliged, at first, to use many arts, in order to smooth over the difficulty which the mind in a rude age had, to conceive, that a person's will could have any effect, when he himself was no more.

* Reg. Maj. lib. 2. cap. 37.

† Glanv. lib. 7. cap. 5.

† Brac. lib. 2. cap. 26.

§ cap. 16, an. 11, Geo. 1.

Thus in the * Roman law, before the time of the twelve tables, no man could transfer his inheritance, except *in calatis comitiis*, with consent of the people, and by way of adoption; in which case the donee took, rather as legal, than as testamentary heir. In the same manner † from the *Regiam Majestatem* and Glanville, it appears, that our ancestors imagined, the ceremony of delivery to be absolutely necessary, to give effect to the deed of the testator; in which case, the donee did not so properly take after death by testament, for the law says, *Deus et non homo facit hæredes*; as he took, by donation, during life. According to those authorities, if delivery had not followed, the heir might have disputed the gift; for without such delivery, says the law, *id intelligitur potius esse ruda promissio, quam aliqua vera promissio, aut donatio*: This is the origin of our dispositions *inter vivos* in Scotland, to take effect, in point of form, *de presenti*; and even to this day, in England, no deed of feoffment is good against the heir at common law, if delivery hath not followed upon it.

But there is a long interval, in the progress of human society, between such alienation, *mortis causa*, as is made good by delivery during life, and that alienation, which is made good, by barely notifying a few words in a testament: The latter follows the former, at the distance of centuries. One thing which very much helps on

* Heinec. antiq. Rom.
Glanv. lib. 7. cap. 1.

† Reg. Maj. lib. 2. cap. 18.

the progress of this last, is the use of letters becoming common ; for even supposing the idea of property were pretty much extended, before letters came into common use ; yet still the mind would have difficulty to assent to this, that a man's will should have effect after he himself was no more ; but the invention and common use of writing make all illusions, to smoothe over this difficulty, unnecessary. When I see the will of a person lying on a table before me, he seems present with me, and commanding as if he was alive : This strikes the senses, and assists the imagination in transferring property to a living, from a dead person, by the will of the deceased. Thus it comes to be law, because it is every body's interest it should be law, that men may name heirs by testament as they please : nor is this all, for men being fond of power, and letters expressing the exertion of that fondness, they name heirs to these heirs. Thus substitutions come into law ; and *fidei commissis*, conditions, entails, with many other effects of pride, refinement, and an extended idea of property accompany them.

To the exertion of this power, the consent of the heir was taken at first, as appears from a variety of old charters both in * England and Scotland ; and, at an after period, when this consent was not asked, the heirs, as we learn from † Sir Henry Spellman, were influenced to ratify the deeds, *ob pietatem*. But as it depended upon these heirs, during the former of these periods to

* Mad. form. Angliz.

† Spellm. of ancient deeds, 234.

consent to the donation at all, or during the latter to confirm it; their doing either of these, was rather a matter of private choice, than of publick enforcement; and during neither of those periods can it be said, that the validity of testaments was established.

We have already seen, that the free voluntary immediate alienation, and the free involuntary alienation of land property, either for the debt of the vassal, or for the debt of the ancestor, arose originally in burroughs: In the same manner, the same causes always producing the same effects, the first free alienation of land by testament, arose, in the decline of the feudal law, originally in burroughs.

This we learn from Lyttleton, who lived in the reign of Edward the fourth: That most accurate of lawyers * informs us, that the custom of devising land by testament, had first taken place in burroughs.

This species of alienation, like the other two branches of alienation, was quickly transferred from burroughs, to the rest of the country, partly by the interposition of courts, partly by devices of lawyers, and in the end by publick law.

Partly by the interposition of courts: For though a deed of feoffment was not good at common law, without livery, yet validity was bestowed upon it by the courts of equity. — *Partly by the devices of lawyers:* For though the ancient rule, that a man could not alienate his lands by testa-

* Lyttl. lib. 2. sect. 167.

ment, stood in the law books, yet the invention of the distinction, between uses and lands, gave great room for a testator to dispose of the profits, though he could not dispose of the land itself. Lawyers found out too, that he might order, in his testament, his executors to alienate his lands for certain purposes. At first he was allowed to exercise such powers for the good of his soul; but by the preamble of act 4th, *ann.* 21. Hen. VIII. it appears, that this pretence had been extended to paying his debts, satisfying his legacies, &c. Afterwards, many people were not even at the pains to use these circuits, but devised directly by will; as appears from the preamble, and a particular clause * in a statute of the 27th of Henry VIII.—*Partly by the aid of publick law:* Henry the VIIIth in the 23d year of his reign, endeavoured indeed to check the unlimited power of devising: he made offer to the Commons, as is related † by the historians of his reign, to permit people to devise one half of their lands; and when the Commons refused to accept that offer, he ordered the import of the ancient incapacity of devising to be debated in chancery by the judges and learned men of the realm, and in consequence of their determination formed an order discharging men to devise any part whatever of their lands. But four years after, he was obliged to yield to the universality of the custom, and consented † to a statute, declaring all wills made 40 years

* An. 27. Hen. 8. cap. 10. preamb. and sect. 11.
fol. 202 & 203.

† 27 Hen. 8. cap. 10.

† Hall.

preceding the date of it, *to be taken and accepted as good and effectual in the law.* In the end the practice of devising became by the statutes * of the 32d and 34th of the same prince, no longer the device of lawyers, no longer an exception from the old law, weak as it was, no longer an acquiescence in that exception, but received the explicit and ample sanction of the legislature. By these statutes, lands, with an exception of those which were held by knights service, were allowed to be devised by will; and when knights service came to be abolished, these lands were allowed to be devised too. Nay, so extensive is the notion of mens powers over property in England, that not only can a person devise his immoveables by will, in writing, but he may devise his moveables, to the greatest value, by a nuncupative testament, if it be sufficiently proved.

In Scotland again, we could not originally give away land to disappoint the heir, unless by feisin during life; afterwards the distinction betwixt the life rent and the fee was fallen upon, and the donor gave away in his life-time, the latter, while he retained to himself, with a power of revocation, the former. In the further progress of things, the use of procuratories was used; these answer to the English powers of attorney, but they differ from them in this, that by a particular statute † in Scotland, they may be executed

* 32 Hen. 8. cap. 1. 34 Hen. 8. cap. 5.
cap. 3j.

† An. 1693.

after

after the death of the donor; so that by the introduction of these, it became unnecessary to deliver seisin during the life of the donor. Now-a-days, though we once attended the English too closely, in the voluntary alienation of land property, and most absurdly ran before them in the involuntary alienation of it; yet our customs are so far accommodated to the degree in which the feudal law is still amongst us, that we do not devise moveables by nuncupative testament beyond a trifling value; and in the alienation of land property to take effect after death, we use the ceremony of a disposition *inter vivos*, to be carried into effect by the execution of the procuratory. At the same time we are approaching so fast to the practice of devising lands, that at present a bare disposition with a clause dispensing with non-delivery, found lying by a man at his death, though it had neither procuratory of resignation, nor precept of fasine, would bind his heir: It would indeed require the circuit of an adjudication in implement, to make it effectual, and by that means may be said to derive it's validity from the act of the heir, or of the law; but whatever be in this, such a disposition would, in the end, be valid in law, and against the heir.

Upon a review of these three branches of alienation, it appears, that the laws of England and Scotland, originally the same, have, after departing long from each other, arrived by different courses, at being nearly the same again. The difference of circumstances obliged them to forsake

take each other, the familiarity of circumstances is now bringing them together anew ; and a few ages will probably make the re-union complete.

There is, however, some doubt, whether there be not one restraint in the law of Scotland common to all the three branches of alienation, which cannot now subsist in the law of England ; the doubt is, whether a superior can be forced to receive a body politick ? and the difficulty arises, from the hurt done to the superior, in being forced to receive a vassal, who never dies, and from whom therefore, when once entered, none of the emoluments of superiority can accrue. Craig * declares against receiving such body politick ; lord Stairs does the same ; and Spotswood, in his † observations on Sir George M'kenzie's institutions, says, that the barons of exchequer, after the union, refused to pass any signature of land holden of the crown, in favour of societies, or corporations, or bodies politick.

This point received a decision in the † case of the university of Glasgow, not many years ago, in favour of the body politick ; but that decree was afterwards reversed in the house of peers.

The statute 20th of George II. in providing for the more easy and compleat transferring of land property, leaves this doubt as undetermined as before ; that statute in ordering who shall be admitted, and how that admission shall be made good, uses the words, *person who shall purchase or acquire*

* Craig. lib. 2. tit. 2. † M'kenzie's Inst. lib. 2. tit. 4.
 ‡ Dict. Decis. v. 2. p. 408. Bankton, v. 2. p. 235.

lands in Scotland; leaving it thereby uncertain, whether these words be limited to natural persons, or can be extended to bodies politick. A few words in the statute would have ended the doubt; but what the explanation of the words, which are now in it, will be, must be left to future decisions of judges, or to future parliaments. It is probable, however, that the genius of the times, in favour of the compleat commerce of land property, will make a particular statute unnecessary, and that the judges, notwithstanding the above judgment of the peers, will take upon them, to give to bodies politick, the same privileges which natural persons have.

CH A P. IV.

History of E N T A I L S.

AFTER the feudal law had, in the manner described in these papers, been for some time on the decline; it was again, notwithstanding the general bent of men against it, in some degree revived, by the bent of particular persons.

It was obvious to the ancient nobles, that the allowing land to come so much into commerce, tended to weaken them; by the prodigality of some, and the misfortunes of others of their own body, their lands, they saw, were continually shifting into the hands of people, who had formerly been little better than their slaves. In order to prevent such consequences, the great nobles

N

invented

invented the artifice of entails, which took particular estates out of commerce, and with regard to those estates, revived the spirit of the feudal law.

English
Entails. Thus in England, in the time of Edward I. the feudal system had so far deviated from its original strictness, that proprietors in general were attaining the capacity of alienating their lands, of charging them with rents, and by their crimes could subject them to forfeiture: but the nobles, to stop the effect of this freedom of alienation, extorted from that prince * the statute *de donis conditionalibus*. This statute gave a sanction by publick law to private men to entail their estates; and declared, that fines levied upon estates so entailed should be void. Most of the great families took advantage of the permission, and by doing so, prevented their posterity from alienating, from forfeiting, or from charging with rents.

There is no maxim in politicks more generally true, than that power follows property: In process of time, the property of these great families continually increasing, and never diminishing, their power grew to such a height, as enabled them totally to enslave the people, and sometimes to overshadow the crown.

These entails continued long in force, and the effects of them long in force too. But in the end, as the still progressive increase of commerce gave a more general and universal bent for the

* St. West. cap. 1.

alienation of land; and as that commerce established a luxury, which the great families, beyond others, rushed into; many of the nobles, to supply their prodigality, were willing to shake off the fetters of their entails; and the more so, as monied men were willing to give them any money for their land: entails then, came to decrease in their force, and in time, in their effects.

The great lords could not indeed be prevailed upon to make an alteration, in parliament, of the law of entails; but then, entails were suffered to be greatly discouraged in courts of justice.

For, on the one hand, the judges restrained all devices for new species of entails, and therefore, when in the reigns of * Richard II. and Henry IV. attempts were made to settle estates, with substitutes, under conditions, that if any of the substitutes or their issue should alienate, then their right in the estate should cease, and the estate forfeit to the next in order, the judges refused to give their sanction to settlements of that kind.

On the other hand, such devices as had been invented to elude the old entails, were sustained †. Several are collected in the new abridgment of the law which had been early introduced, and in the end, the device of a common recovery to bar an entail, was supported by a solemn decision in the reign ‡ of Edward IV. The form of a recovery is that of a collusive suit and judgment,

* Coke, Lyttl. p. 377.
p. 541.
40. (B.)

† Voc. Fine and Recovery.
‡ Sir Anthony Mildmay's case, Coke 6. rep. fol.

and therefore under the very form of the law itself, the law was eluded.

But the politick prince Henry VII. who saw in all its lights, that superiority, which the preservation of land property in their families had given to the nobles; a superiority which had cost some of his predecessors their lives and their crowns, freed lawyers from the trouble of inventing future devices against entails: He got the famous statute passed *, in the fourth year of his reign, which made a fine, with proclamations, to conclude all persons, both strangers and privys. This was not so properly evading, as repealing the statute *de donis*; for as it was the purport of the statute *de donis*, that a fine should be *ipso jure* null, so it was the purport, on the contrary, of the statute of Henry VII. that a fine should be valid, to bar the persons therein intended to be barred. The form of a recovery had been that of a collusive suit and judgment; the form of a fine, was that of a collusive agreement acknowledged on such terms, and with such circumstances, as were sufficient to defeat the entail.

By this statute the right and interest of all persons were saved, which accrued after ingrossing of the fine, they pursuing their right within a certain time after it accrued: On this clause, a doubt occurred in the reign of Henry VII. whether the issue of a tenant in tail could be barred by the statute, notwithstanding that by the general tenor

* An. 4. H. 7. cap. 24.

of it, privys were barred. The judges * embraced the occasion, which the ambiguity gave them, of defeating entails, and bound the issue by the fine. A statute of † the succeeding prince approved their construction, gave a retrospection to that construction, and prevented the ambiguity for the future.

Nor were these statutes agreeable to these princes only; the genius of the times too, was bent against the feudal system, and every thing which tended to revive the effects of it. A commercial disposition had brought in the necessity of allowing an unbounded commerce of land; the landed men, the monied men, found their views equally hurt by entails: The lawyers in their writings had been long inveighing against them, and the judges, by their judgments, had long been discouraging them.

Perhaps those various ranks of men did not foresee, in all their consequences, those important effects which quickly followed from the dissolution of entails, and from the transition of property consequent on it. Perhaps too, it would be urging too far in favour of a system, to say, that this dissolution was the sole cause of the great alterations, which have since happened in the constitution of England; yet so far, it is obvious and certain, that added to the dissipation of the church-lands by Henry the VIIIth and the alienation of great part of the crown-lands by queen

* Bacon, *voc. Fine and Recovery*. (E.)
cap. 36.

† An. 32. H. 8.

Elizabeth, the dissolution of entails produced that transition of property from the lords to the commons, which so soon after made the commons when possessed of almost all the land property of the kingdom, too powerful for both the nobility and the king; so insolent, as by a vote to declare the nobles no necessary part of the constitution, and by a publick trial and publick execution, to put their sovereign to death.

Scotch
Entails. The same desire of reviving the spirit of the feudal law, at a time when that spirit was decaying, which had introduced the statute *de donis* into England, introduced likewise the artifice of entails into Scotland. But as the general bent of the nation against the strictness of the feudal system, came much later into Scotland, than into England; the attempts of particular persons to revive the effects of that system, were necessarily more late too, in the one nation than in the other.

As long as a great part of the lands in the country were unalienable beyond a half; as long as there was not a sufficient commerce, to cause a considerable fluctuation of land property; and even when land came more into commerce, as long as the great families were powerful enough to defy the law, and to laugh at execution by apprisings used against their estates; there was no need of entails. In the highlands of Scotland, at this day, entails are far less frequent than in the low-countries.

But

But when arts and commerce introduced luxury, when the alienation of land property became more frequent, and when the voice of the laws was heard through the land, then people, to secure their families, introduced entails.

The first instance, so far as I have heard, that occurs in our records, of a prohibitory clause *de non alienando*, ingrossed in the infeoffment, is, * in the year 1489; and even that instance is singular: In the revocation of tailzies by the Scotch princes in parliament, nothing more is meant by a tailzie, than a conveyance, altering the course of succession from heirs general to heirs male. † President Balfour, in his Body of Law, accurate and complete, seems to have had no other idea of them: Skeen in his treatise *de verborum significatione*, in which he gives an account of all the objects of law, that were of consequence in his time, makes no mention of entails. Craig indeed has a chapter upon the subject of entails; but the superficial way in which he treats it, shows plainly, that the age in which he wrote, which was about the year 1600, had not the knowledge of entails, in the same degree which we now have.

By that author's account of them, they seem to have been no more than simple destinations, cutting the ordinary course of succession, defeasible by every possessor, attachable by creditors, and the heirs of which were rather heirs of pro-

* Record of Charters, lib. 12, No 106. 1489. Jan. 4. cart. Alex. Hume.

† Balfour, tit, tailzies,

vision than of tailzie. In this light † Craig says justly, “ hi autem ex tallia hæredes alio etiam nomine hæredes provisionales dicuntur :” and afterward, “ itaque provisio nihil aliud est, in effectu, quam tallia :” and in another paragraph, “ rumpitur autem, sive dissolvitur tallia, ex mutuo consensu domini superioris et vassali, eodem quo constituebatur modo ; cum nihil sit tam naturale, quam unumquodque, eodem modo dissolvi, quo colligatum est, sive constitutum fuit.”

After this period it appears, from the decisions of the court of session, and from the records, that people came into the use of inserting prohibitory clauses in their settlements. By these the heir was prohibited to alienate, or to create charges on the estate. But as there was no necessity for the registration of these prohibitions, and without registration creditors could have no knowledge of the limited nature of the settlement ; the judges, in order to pay as much regard to the will of the entailer as they could, consistently with the safety of others, resolved, to consider such estate, as absolute and unfettered with regard to creditors, but as limited and fettered with regard to the proprietor : in which view they allowed the former to attach it for debt, but they did not allow the latter to convey it gratuitously.

To get free of this distinction, and to fetter their estates equally in both cases ; people fell next upon the contrivance of serving inhibitions

• Craig, lib. 2, dig. 16,

upon these prohibitory clauses. Inhibitions were obliged to be recorded, and therefore the contrivance seemed favourable; yet even the force due to settlements in that form, was called in question * by lawyers adhering to the maxim, that though an inhibition may give force to an old security, it cannot create a new one.

The invention of those, who wished to preserve their families by entails, and of those who were employed to execute what the others wished, fell therefore upon further expedients; and at length, clauses irritant and clauses resolute were invented, which enforced the settlement, by subjecting to penalties, those who were concerned in infringing it. By the one clause, all the new charges upon the estate were made void, and the creditors were disappointed; by the other the right of the contraveining member of entail was made void, and the next heir was called to the succession.

These clauses, in the time † of lord Stairs, that is to say, about the middle of the last century, became very frequent in entails: Sir Thomas Hope who was advocate to Charles the 1st says ‡, "They were forms newly found out." These authors when they mention these clauses seem, and indeed all the lawyers of their age seem to have been greatly at a loss, to determine what regard was due to them; for on the one hand, there stood the will of the entailer, a will contrary to no law; and on the other hand, there

* Hope, p. 402. Bankton, vol. 1. p. 584.
P. 220, 228, 591.

‡ Hope 403.

† Stairs,

stood

stood the danger of entrapping the rest of the subjects, through the want of a register for entails.

At last a prohibition to contract debt, with an irritancy of the contraveeners right in an entail, both of them indeed contained in the original feifins, and repeated in the subsequent ones, received, *anno* 1662, a solemn decision, after a pleading appointed in presence of all the judges, in the case of the viscount of Stormonth against the creditors of the earl of Annandale *. By that decision not only the right of the earl of Annandale, who had contraveened, but that of all his creditors, who had apprised, was made void.

This decision was justifiable, on the repetition of the prohibitory and resolute clauses in the infeoffment; but as it was not certain, that the same decision might not follow, though the same repetition was not observed, it became high time for the legislature to interpose, and to give precision to a form of conveyance, that was now becoming so extremely important in its consequences.

For this reason the statute † of 1685 was made: That statute though it gave sanction to entails by publick law, yet on the other hand took care, that third parties should be acquainted with the existence of the entail; for at the same time that it prevented entailed estates from being alienated, or charged, or carried off by creditors, it

* Stair's Decisions, Feb. 26. 1662.

† An. 1685. cap. 22.
likewise

likewise ordained, that the entail should be produced before the lords of session, to be approved by them; that it should be recorded in a particular register, and that all the provisions and irritancies should be inserted in the original, and every subsequent seisin. With regard to this last requisite of entails, it was further ordained, that though the non-repetition of these provisions and irritancies should infer a dissolution of the right of the present proprietor, yet it should not prejudice the creditors. These last had contracted *bona fide*, they had not seen the provisions and irritancies in the register, and therefore it was thought right that they should be obliged to attend to nothing but what they saw in it.

Thus entails were made as effectual by statute among us, as they had been made by the statute *de donis* among the English.

As the same cause which introduced entails in England, introduced them in Scotland; so the same cause which brought about the discouragement of them in England, brought about likewise the discouragement of them in Scotland: In all ages and all countries, the same causes must have the same effects.

At one period, it had become the aim of the lawyers and judges of the one country, when entails grew troublesome, to elude that species of settlement. At another period, it became the aim of the lawyers and judges of the other country, if not to elude altogether, yet very much to limit their entails.

Thus,

Thus, in the case of the viscount of Stormonth, though there was no clause irritating, that is, annulling the right of the creditor, yet the lords had disappointed the creditors; but now, on the contrary, they found, in the case * of Bailly against Carmichael of Mauldsly, anno 1732, that if there was not a clause irritating the right of the creditor, the charging the estate, though it would irritate the right of the heir, yet would not irritate that of the creditors. Thus, in the case † of the estate of Carlowry, where there was a prohibition, *to alter the succession or contract debts, or do any deed whatsoever whereby the lands might be evicted, or the succession prejudged*: And in another case, where there was prohibition ‡ *to alter, innovate, or infringe the aforesaid tailzie, or the order of succession therein appointed, or the nature or quality thereof, any manner of way*, they found, that the heir of entail was not barred from selling. These two decisions were given on the apparent medium, that in those clauses there were no express words prohibiting to sell; but on the real medium of aversion to, and contempt of entails. And thus, though by the statute of 1685, on a contravention, the right of the contraveener was declared to be *ipso jure* void; yet the judges have allowed it to be only voidable upon declarator; and even upon that declarator, they have held the irritancy to be purgeable at the bar.

* Dist. Decif. voce Tailzie. † An. 1745. ‡ 7 June, 1746. Heirs of Campbell against Representatives of Wightman,

Yea so far did the judges go in disappointing entails, that when some of their judgments went up to the house of peers, that assembly, in a country still more an enemy to entails than our own, drew the rule of decision more from the letter of the law-books, than from the genius of the times, and refused their sanction to the judgments.

Thus, in the dispute not many years ago, between the heir of tailzie and the creditors of Sir Robert Denham, the court of session had found a tailzie continuing in the form of a personal deed, but not recorded, to be ineffectual against creditors. The house of peers *, on the contrary, although it is law, that a deed of tailzie not recorded, if compleated by infeoffment, is not good against creditors; yet were of opinion, that a tailzie, as long as it remained a personal deed, and not compleated by infeoffment although not recorded, was good against them.

Hitherto entails have been considered, as disabling the heir to alienate, or the creditor to attach; it still remains to take notice how far they were subject to forfeiture.

Forfeiture
of Entails
in Eng-
land.

On this head a remarkable difference occurs between the laws of England and of Scotland. In the first of these countries, till a very late period, entails were never subject to forfeiture; in the other, till a very late period, they always were.

* Bank, vol. I. p. 590.

To find out the reason of this, we must look very far back into the laws of both kingdoms.

Before the statute *de donis*, lands in England were divided into fee simple, and what Lyttleton calls fee simple conditional : One possessed in fee simple, who held an estate of inheritance descendible to his heirs ; one possessed a fee simple conditional, to whom an estate had been given, descendible to the heirs of his body. In the first case, the possessor had an absolute property in him, and could alienate, charge with rents, and forfeit : In the other case he had in him only an estate conditional : The donor still retained an interest in the estate, and failing the condition, that is, failing issue of the donee, had a right of reversion in it. In consequence of this, unless the donee had issue, he was restrained from doing any thing to the prejudice of the donor ; and as he was not capable of alienating his land, so no more was it in his power to subject it to forfeiture, seeing this last, would have created as much prejudice to the donor as the other.

Thus, it came to be a maxim in the English law, that who cannot alienate, cannot forfeit ; a maxim unknown in the older English law, and unknown in the feudal law, in both of which, though a man could not alienate above a certain part of his fief, yet for his treason the whole of it was forfeited.

When the statute *de donis* was made, this maxim which had been first introduced, and justly, in favour of the donor, was extended, and erroneously,

ously, in favour of the heir. It had been just that who could not alienate, could not forfeit to the prejudice of that person from whom the gift came, and only conditionally came; but it was absurd to say, that who cannot alienate cannot forfeit to the prejudice of an heir, from whom nothing came. The application of this rule however, was made to preserve estates tail, upon the statute *de donis*, free from forfeiture for some centuries.

It is extremely entertaining to a philosophical mind, to observe the different fates of laws, and maxims of law, not only from general causes common to mankind, or common to that part of them governed by one system; but to observe their different fates, from particular exigencies and situations. By a mistaken interpretation, the English extended the rule, that who cannot alienate cannot forfeit, from fees simple conditional, to fees tail upon the statute *de donis*; and yet, when by the devices of lawyers in the reign of Edward IV. and the sanction of parliament in that of Henry VII. estates tail became by consent alienable, they refused to extend the same interpretation to the forfeiture of such estates. They had refused to subject estates tail to forfeiture, and on this medium, that who cannot alienate cannot forfeit, and yet, when that medium was taken away, they refused to find, that who can alienate can forfeit.

The first interpretation had been applied in the days of ignorance, and when the conceptions

of men were not very accurate with regard to law matters: the other interpretation was refused in the days indeed of knowledge, and when mens notions were on such subjects more accurate; but in the days too of civil discord, when the disputes between the houses of York and Lancaster, made the judges fearful, even upon the most obvious interpretation, of opening any more doors to forfeiture, at a time when, as lord Coke expresses it, *the pains of treason were so averse, that there was no man d.d know how to behave himself, to do, speak, or say, for doubt of such pains.*

When those disputes, and those dangers were over, estates tail were put upon the same footing with other estates. And, by a * statute in the reign of Henry VIII. we e subjected to the same penalties of forfeiture with them.

At the same time, as this last statute had a clause, saving all rights, titles, or interests of third parties, the rights of remainder men or substitutes fell under the salvo; for these remainder men were considered to have in them a conditional estate, to take place upon the failure of the tenant in tail and his issue, and separate from their estate.

In another statute * of Henry VIII. the saving clause is more particularly expressed; and those are saved from forfeiture, under the express name of remainder men, who, in the former statute, had been by implication saved from it under that of third parties.

* An. 26. H. 8.

† An. 33. H. 8. cap. 20.

With regard to Scotland again, that there once was a period in the law of that country, when one posselt of a fee simple conditional, could not do any thing to prejudice the donor, may be very true; and if entails had been introduced during that period, it is very probable the privileges of donors would have been extended to heirs of entail.

But entails were introduced at a different period in Scotland; at a period when the donor himself had lost his privilege; for when donors, to preserve still more firmly their interest in the gift, had invented clauses of return to themselves failing the heirs named, and thrown them into their grants, yet lord Stairs, in many passages of his book, and other lawyers of his time, represent it to be law, that such limited estate could be apprised by creditors, notwithstanding such clause of return.

Now, as every such estate could be alienated, unless limited by the nature of the holding, the maxim who cannot alienate cannot forfeit, could not be thought of.

When the modern entails then came in, this maxim which was before unknown in the law of Scotland, could not be applied; and if in point of forfeiture, so little attention had been paid to the interest of the donor, from whom the estate came, it is not to be expected, that any more attention in point of forfeiture, should have been paid to the interest of the heir, from whom nothing came: and therefore, entailed estates were

Forfeiture
in Scot-
land.

sub-

subjected to forfeiture in prejudice of the heirs, in the same manner that estates with clauses of return had been forfeitable to the prejudice of the donor.

We read nothing of the maxim, who cannot alienate cannot forfeit, in the old books of the laws of Scotland, nor in the statute of 1685; which last, on the contrary, makes a particular proviso, that the entails confirmed by it, shall not disappoint the king of his forfeitures; nor in the writings of any of our lawyers, till the year 1690, in an act of king William. At that period, we borrowed from England and brought into the statute book of the one kingdom, a maxim, which had been invented four hundred years before, in the other. In that statute, men, as the appendix to Considerations upon forfeiture elegantly expresses it, *not looking forward with enlarged views to future contingent dangers from the abdicated family, but attentive only to that dark scene, which had been just closed with such wonderful circumstances of felicity to both kingdoms*, ordained, that entailed estates should be safe against forfeitures, except for the life of the forfeiting person. The maxim who cannot alienate cannot forfeit, was the pretence; but the same remembrance of the bad use made of forfeitures, which in England, till the reign of Henry VIII. saved entails from forfeiture, even when they could be alienated, was the real cause of this saving in Scotland. Nay, so great was the remembrance of the miseries brought on the country by forfeitures, du-

ring the two reigns immediately preceding the revolution, that people were not contented with the security conferred by this statute ; and therefore in order that the estate might be secured, not only after the death, but even during the life of the forfeiting person, they frequently added clauses, irritating the possessor's right in case he should become rebel, and directing that in that event the estate should devolve, *ipso jure*, on the next heir.

What effect such clauses would have had, or whether they would have enabled the next heir, during the life of the traitor, to have run off with the estate from the crown, was never determined by regular decisions on the point, in the law of Scotland ; nor could that effect well be determined, as the whole system of our law of forfeiture was soon afterwards overturned.

By an act of the 7th of Queen Anne, entitled, Act for improving the Union, the Scots law of forfeiture was made to give place to that of the English.

This act was made, as appears by the preamble of it, with a general view, to make the laws of the two parts of the island with regard to forfeiture, the same. But whatever were the particular objects, which the parliament of Great Britain had at that time in their view, it is certain, a great doubt was on that statute created in law, whether it was the meaning of the legislature, thereby, to subject the entails of Scotland upon treason to a total forfeiture. On the one hand it was maintained that the English having no
con-

conveyance of estates like the conveyance in question, it could not be the intention of the English law, though extended to Scotland, to forfeit, without express words, an estate not known in that law: On the other hand, first, from the comprehensive words of the English statutes of treason, referred to in the act of queen Anne; and next from the necessity there was, considering the dissimilarity of conveyances, in the two nations, to compare the conveyance which subsists in the one country, with that which comes nearest to it in the other, in order to be able to apply the law; it was maintained, that tailzied estates in Scotland fell to be subject to forfeiture, as estates tail in England were.

After the rebellion in 1715, the court of session, the commissioners of forfeitures, and the court of delegates seemed all greatly perplexed, what determination to give upon these entails. The judgments of the two last courts particularly, often went cross to each other, but in general, the judgments ran * in favour of entails.

The house of peers was under the same difficulties at the same period, in the cases brought before them by appeal, and laid hold of special circumstances, in order to avoid determining the general point. Thus, in the cases of *Cassie of Kirkhouse*, and of *Sir Robert Grierson of Lag*, they reversed the decrees of the court of session, which had been given in favour of the heirs of entail; but they reversed them on the footing of want of

* Cases of *Coul*, of *Calumby*, of *Kirkhouse*, of *Lag*, of *Crombie* and of *Seaforth*,

jurisdiction in the court of session. And in the case of Assint claiming the estate of Seaforth, though the judgment of the court of session in favour of the substitute in the entail was reversed; yet the reversal, as there were specialities in the case, was far from fixing the general question in the law of Scotland.

But after the rebellion of 1745, the house of peers, upon the solemn opinion of all the judges in England, made use of an expedient, which on the one hand, is a sufficient penalty to deter men from treason; and on the other hand, does not forfeit entails altogether; and both of which ends were attained, in consistency with law, and the exactest analogy of law. In the case of captain Gordon claiming his brother Sir William's estate, the peers found that Sir William forfeited for himself, and such issue of his body, as would have been inheritable to his estate, if he had not been attainted; but they found, that he did not forfeit for his brother, who in virtue of the substitution to him, in the original entail, was accounted the same with a remainder man in England.

By this judgment that solecism in politicks is taken away from the law of Scotland, that a man should have it in his power, by his mere will, to prevent his posterity from being punished for their crimes; and that inequality between the laws of England and Scotland was abrogated, so inconsistent with the otherwise equal rights of the two nations; that an Englishman possess of any
estate

estate except one for life, should be subject to forfeiture for treason, but a Scotsman, not only if posselt of an estate for life, but if posselt of an entailed estate, should not.

The only dissimilarity in respect of subjection to forfeiture, that remains now in the two species of entails, is to the disadvantage of the Scotch entails; for whereas possessors of entailed estates in England, meditating treason, may by fine and recovery prejudice the king; on the contrary, a possessor of an entailed estate in Scotland, must in his treason see the certain and uneludable forfeiture of himself and his issue.

As the laws of the two countries are otherwise come now to be the same, with regard to the forfeiture of entailed estates; so in most other respects, there is by no means that excessive superiority in strictness of the Scotch over the English entails, which is often superficially imagined.

Thus in Scotland, if the tenant in possession has been called as heir whatsoever, the entail breaks of itself; or where he has not been called in that last place, the prophecy of * lord Stairs has come to pass, that when entails became frequent, the heirs of such of them as were cumbersome, would apply to parliament for redress: upon such special application, redress is constantly granted. When the first nominee repudiates the entail, it descends as a fee simple to the other nominees. If the limitations be laid on the heirs of entail, and the maker of the entail takes

* Stairs, p. 229.

the investitures to himself in life and to the person he intends to favour in fee, this last will be deemed to be a dispositive not an heir, a first institute not a substitute, even although he was son and heir to the maker of the entail; and in consequence of this supposition he may avoid and destroy the entail altogether. Again, even when the person favoured is fixed in the apprehension of law to be a substitute, he may still by neglecting to repeat the resolute and irritant clauses in his infeoffment, charge the estate with debts to its value, or even sell the estate. In the event of such charge or such sale, the charger or the seller would indeed subject himself to an action at the instance of the next heir; but the creditor or the purchaser would be safe. To give another instance; the interests of an original debt upon an entailed estate allowed to run up unpaid by one tenant in tail, will affect the entail in the hands of the next tenant upon his succession: these interests formed into a capital sum will create a new debt on the estate, and as he likewise may allow the interests of this debt to run on unpaid, it is obvious that in process of time the entail by repeated negligences of this kind, either real or affected, may be eat out altogether. Nor have entails in Scotland the same fair interpretation, that entails in England have; on the contrary, the judges by limiting their interpretation, when that interpretation would make for entails, and extending it, when it will make against them, impose

pose additional clogs, upon that species of settlement.

By these encouragements in the attack, and those discouragements in the defence, and by many others, it happens, that there are almost as many entailed estates in Scotland, gradually turning into fees simple, as there are fees simple turning into entails: when yet by the law as remaining, many of the old families are still enabled to preserve themselves in their estates, and while they share the wealth, the liberty, and safety of the English, find their antient lustre the same; instead of seeing (as a lord in the Scotch parliament, in the debate on the union, pretended to foretell) an excise-man more honoured and revered than an antient noble of the land.

Men who were to consider the measure of a total dissolution of entails in Scotland, as it regards their country, might perhaps foresee, that this would bring so much land property into the market, as from the cheapness occasioned thereby, would call the money out of trade to the purchase of land; as would render our landed men discontented and bankrupt, and favour the too eager propensity of our traders, when they have got a little money, to become little lairds, poor, proud and idle. Instead, therefore, of wishing that more land property were brought into market, he would perhaps wish that we had as little as the Dutch, or that the price of what we had was kept high; the former to turn our inactive country-men into manufacturers and merchants,

chants, and the latter to put it out of their thoughts when they were become such, to convert their circulating cash into a dead stock of land. And in general, he would in part foresee, and in part dread many consequences, which attend the innovation of every system, if not at the exact period of society ripe for that innovation.

But whatever regard might be due to those who reasoned thus, upon the constitution of their country, and the state of families, or on the favour of trade, and against the risk of hurting it; thus, surely one who was a lawyer, and who was inquisitive in tracing laws, their regular progress and declension, would reason. First, he would look back, and unmoved, by all that clamour, which past lawyers foreseeing rather what might happen, than what has happened, have raised against entails; he would reflect, that though their prophecies were founded on reason, yet from many circumstances, they have come to nothing. Next, he would look forward, and conclude, if ever the mischiefs, which in reason seem to attend upon entails, should in fact happen; should the number of entailed estates, instead of decreasing, increase, and should there be any considerable failure in the commerce of land upon that account; or should there be so extended a trade, as to make even an inconsiderable failure in that commerce a detriment; should there be so much money to keep up the price of lands, and so much industry to stock trade sufficiently,

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as

as that any attempt to preclude men from the most unbounded commerce of land, would be no advantage to a nation, and only a cruelty to private men : that then our entails will share the fate of almost all the other remains of the feudal law. He would foresee that they will either be abolished altogether, or exchanged for those of the English ; and as in the act of the 7th of queen Anne, which subjected entailed estates to forfeiture, there was an exception made, in tenderness to the wife who had contracted with a man so seemingly secure against forfeiture, and in tenderness to her children ; so when our entails come to be abolished, or exchanged for those of the English ; such an enquirer and reasoner would expect that the same tenderness to the wife who contracted with a man so seemingly secure against alienation, and the same tenderness to her children, will produce the same exception, in favour of the children of those, who being possessed of entailed estates, or of those who being immediate heirs of such estates, are married at the time of passing the act.

This exception will preserve a few of our entails only one generation longer, and no more, and perhaps, in future ages, as in the case of many other branches of the feudal system, it will be remembred no where but in books of antiquities, that such a species of conveyance ever existed.

Till this period arrives, our conveyancers will be inventing new clauses to guard entails ; our lawyers will be inventing new devices to elude these

these clauses ; our judges will for sometime fluctuate between the two, and our parliaments will be passing laws to enlarge the power of those who are too much limited by the limitations of their entails.

Since this treatise was wrote, an application is preparing to parliament, for allowing tenants in tail, in Scotland, to provide wives and children with moderation ; to exchange lands ; to charge with debt in proportion to the improvement of the rent made by the proprietor ; to grant long leases ; and to feu to certain extents.

Wise governments find it safer to conduct than to thwart, to point out to men their good, than to drive them to it ; to enable them to relieve themselves if they please, than to force relief upon them against their wills ; and to soften by degrees, instead of overturning at once without the most urgent necessity those general customs of a country, which once had the authority and encouragement of law.

C H A P. V.

History of the Rules of Descent or Succession.

IT has been a great loss both to history and to law, that they have too little contributed their mutual aids to each other : lawyers themselves seldom give historical deductions of laws, and historians seldom meddle with laws at

all, even with those which gave occasion for the constitution of a state, and on which, more than on battles and negotiations, the fate of it doth often turn.

For this reason, it is difficult to trace the several revolutions of the feudal laws of descent in any one state in Europe; nor could such revolutions be often traced at all, were it not for the lights which the histories of publick successions afford.

The feudal system, in its regulations, was orderly and universal. Those rules which it applied to fiefs, it extended over kingdoms; and therefore, as in general the same relations who were heirs to the king, were heirs to the lords, so, on the other hand, for the most part, the same rules which regulated private, were likewise the measures of publick succession.

Before Edward I. proceeded to hear the claims of Bruce and Baliol for the crown of Scotland, he put the following question to the parliaments of both kingdoms assembled together: "By what law of succession is the right of succession to the kingdom to be determined?" The answer made unanimously by the parliaments of both kingdoms, was, "That the right of succession to the kingdom is to be judged by the rules observed in the cases of counties, baronies, and other unpartible tenures."

S E C T. I.

WHEN the nations of Germany ^{Descend-}
 first took possession of the Ro-^{ing line.}
 man provinces *, the grants of the conquered
 lands were made to last no longer than during
 the pleasure of the grantors. It was natural it
 should be so in a subordinate body, and where
 every member of that body was sure of a subsist-
 ence on the lands of some chieftain or other, as
 long as he had a sword and a shield: at that
 time these grants were properly called *Munera*.

Soon afterwards they were granted for life,
 and they were then called *Beneficia*, as we now-a-
 days term the possessions for life of clergymen
Benefices.

But when the connection of succeeding gene-
 rations with their native country was entirely
 broken, and their attachment to that in which
 they lived was grown strong, it was accounted
 hard, after the father's death, that the sons should
 not have the possession of what they had formerly
 had a share in the enjoyment of; it occurred
 likewise readily to superiors, that a man would
 venture himself less in battle, when the loss of his
 life was to be attended with the ruin of his fa-
 mily: from these considerations the grants were
 extended to the vassal and his sons, and they were
 then, and not till then, properly stiled *Feuda*.

* Lib. feud. tit. 1. par. 1. Esprit de loix. book 30. chap. 16.

Yet still, during this last period, the right of succession was so limited, that after the death of the vassal and his sons, the fief reverted to the lord.

But the former continually and gradually gaining upon the latter, and becoming less dependant upon him; and on the other hand, the lord standing more and more in need of vassals, to support a constitution, which, in any but unsettled times, was an extreme unnatural one, the succession was first extended * by law to grandsons, and afterwards by practice to descendants *in infinitum*; for those vassals who had been in possession of lands for three generations, and had built upon, and improved them, grew accustomed to look upon them as their own; superiors too, by length of time, and alterations in the lands, at a period when lands were of very little value, and when the improvements upon them were rather the *principale* than the *accessorium*, forgot they had ever been theirs.

The distinction between *dominium directum*, and *dominium utile*, came then to be invented, in order to reconcile the difficulty which the mind had, to conceive a perpetual property belonging to one person, when yet the perpetual enjoyment of it was, and by the concession of all, in another.

This deduction, gradual and uniform as it is, may be followed step by step in the laws and histories of foreign fiefs, but is not so easily traced in Great Britain; for though it be known

* Lib. feud. 1. tit. 1. p. 2.

that

that the dukedoms and earldoms * were in the Saxon times during pleasure, or a very few of them during life, yet it is certain the book-land went in general to the heirs of the immediate crown-vassals; among the Saxons, more early than in any other state in Europe: But at what precise time it began to do so, or by what steps it was granted to more and more heirs, is impossible to say: The English antiquities are involved in mist, and the Scotch in the most profound darkness, during the period in which such alterations might be expected to be found.

It is to be observed, that during the whole of the foregoing period of feudal succession, the inheritance, without fixing upon the eldest son, or indeed on any son at all, was equally divided among all the sons †. *Si quis igitur decefferit, filiis et filiabus superstitibus, succedunt tantum filii equaliter*, says the law of the books of the fiefs. Primogeniture.

But the incompatibility of performing that service by many, which, as the feudal services were of various kinds, could perhaps be performed only by one, being observed; the law of nature, and which, till then, had been in private successions with very little exception the law of the world, gave place totally to a law which was peculiar to feudal principles, and the succession, not only of the daughters who had long before been ‡ excluded, but that of all the sons in gene-

* Assur. de Gest. Alfred. p. 21.
† Ibid.

† Lib. feud. 1. tit. 8.

ral, gave way to the succession of one son, and one only.

At the same time, as the feudal nations were very long in continual dangers, both from foreign invasions, and from intestine commotions, it was plainly incongruous, that the chance of being the first born should give the possession to a person perhaps unfit to defend it; therefore the grantor reserved to himself a power of chusing the particular son whom he pleased to give the fief to: *Sic progressum est ut ad filios deveniret, in quem dominus vellet hoc beneficium confirmare*, says the law of the books of the fiefs *.

A beautiful instance of the remains of this ancient practice, is still to be seen in the law of England, at this day, when a peerage devolves to heirs female †. In that emergency, it is the king's privilege, to confer the peerage upon any of the daughters he pleases.

Some ages after, when security in the feudal settlement made this chance direction of less dangerous consequence, the natural principle of giving the fief, since only one could regularly have it, to that son who first presented himself in the train of ideas, took place; and the right of primogeniture came to be fully established.

The progress of the minds of men in Great Britain, through this last progress of succession, to the establishment of primogeniture, is very easily traced.

* Lib. feud, 1. tit. 1.

† Bacon voce coparceners (C.)

By a law of Edward the Confessor, and * many other Saxon laws, it is obvious, the feudal principle was so weak, and that of the ancient law so strong, that all the children succeeded equally; *Si quis intestatus obierit, liberi ejus succedunt in capita*, says † the law of that prince.

At a lower period in the Saxon times, it appears by many charters, that though the rule of succession, *ab intestato*, was *in capita*, yet people were come into the use of abstracting themselves from that rule, by taking the destination in their charters to one son only; the principle of primogeniture, however, was at that time so weak, that the nomination of the son, in whose favour the destination should operate, was left to the grantee. Thus though ‡ in these charters the grant generally runs *post mortem hæredi uni*, yet it runs too, *hæredi uni cuiumque voluerit*: That is to say, though the grant was limited to one son, it was open to that son, whom the grantee should be pleased to nominate.

The people of Kent, at an after period, having been left, through the favour of the conqueror, in the enjoyment of their ancient laws, the succession *in capita* of the sons, called by the Saxon name *Gavelkind*, was long the universal law of that country, and does, in great part of it, remain even unto this day. The Welch not being subjected to the power, were still less subjected to the laws of the Normans; and therefore

* Lex. Canut. 68.
of feuds.

† Leg. Ed. Conf. 167.—

‡ Spellm.

among

among them that equality of succession which had prevailed before fiefs were introduced, remained as far down as the reign of * Edward I. The Orkney men being left from neglect more than from either favour or independancy in the possession of their antient laws, the sons till within these hundred years succeeded *in capita* in the udal rights of Orkney; nor was this altered by public law, but by private limitations of different successions.

The feudal system having been compleated by William the Conqueror, there is no doubt the right of primogeniture was established by that prince; and yet in the reign of Henry I. the traces of the ancient law were far from being lost †. By one of his laws it is ordained, not indeed that one fief should be split, but that if there were more than one, the succession should be split, and the eldest son have only *primum partis feudum*.

In the time of Henry II. however, these exceptions disappeared in the English law, and the eldest son became the heir, *ab intestato*; nor was this all, the principle of primogeniture about that time grew so strong, that though, from the darkness of our antiquities, we cannot trace the foregoing progress in Scotland, yet, according to the earliest law authorities in this country, as well as according to the same authorities in England ‡, not only could a person not disappoint

* Stat. Walliæ 12 Ed. 1.
chap. alienation.

† Leg. 70. H. 1.

‡ Sup.

the right of primogeniture altogether, but he could scarce even alienate a part of his estate to the diminution of that right.

Hitherto, in the progress of the right of primogeniture, we have been speaking of the succession to a military, but not of the succession, to a fockage fief.

In those military fiefs, the necessity of having one certain vassal to perform that service which perhaps could be performed only by one, had introduced the right of primogeniture; but the same necessity not intervening in these (as I may call them) civil fiefs, the preference of primogeniture did not appear so obviously advantageous in them; and therefore *, both in England, during the reign of Henry II. and in Scotland, during that of David I. in fockage fiefs, all the sons succeeded *in capita*.

But in the after law both of England and of Scotland, this rule of succession appears to have gone into disuse; and both military and fockage fiefs came to be on the same footing.

The example of far the greatest number of fiefs; the distinction of a soldier and focoman wearing away, together with the rigour of the feudal law; the conversion of most of the military into civil fiefs; and the imagination of superiors, that the rent would be easier levied, and better paid, when the fief was in the hands of one, than when dissipated among many; the un-

* Glanv. lib. 7. cap. 1. Reg. Maj. lib. 2. cap. 21.

willingness

willingness of the foccage vassals to have their succession split, or their families brought into greater decline, than those of the military vassals, who were neighbours to them; these imperceptible causes in the circumstances of mankind more powerful than any publick law; and no publick law itself, brought about this alteration.

This alteration was made, and the distinction was lost, between the succession to a military, and the succession to a foccage fief, before the time * that Fleta was wrote in England, and some hundred years before the time of † Skene, Balfour, and Craig, in Scotland.

The progress of the right of primogeniture in publick, corresponds to the same progress of it in private successions.

Thus in the two first races of the French monarchs, the succession to the kingdom was divided among all the sons; and in the earlier periods of the Saxon history, the same division of the kingdom is frequently observed to take place.

Nay, even in much later times, when the rule of primogeniture had taken place in private successions, yet the ancient notions of the rules of succession, added to the power of those who could claim the benefit of them, were so far an obstruction to the principle of primogeniture in kingdoms, that to make up for any weakness in that principle, kings were in use, not only to declare their eldest sons to be their successors,

* Flet. lib. 6. cap. 12. † Skene voce Eneya, Balf. tit. heirs & successors. Craig, lib. 2. dieg. 13. N^o 39.

but to cauſe the ceremony of coronation to be performed, and the oath of fidelity taken to them by the vaffals. This practice was obſerved in France without a ſingle exception, from Hugh Capet, the firſt king of the third race, down to Lewis VIII. and in England by William the Conqueror, to his ſon Robert, in his French dominions, and by a number of foreign princes, down to the 13th century.

After the right of primogeniture was eſta-
bliſhed, it was very long, however, ^{Represent-}
before the right of representation, or the preference of the remoter heir, repreſenting his ancestor, to the excluſion of a nearer, was added to it, either in Great Britain, or in foreign countries.

Many things were obſtacles to the progreſs of the law of representation: The ſimple notions of a groſs people, who were apt to take up with the principle of nearneſs of blood, inſtead of looking forward to a more enlarged juſtice; the barbarity of the times, in which the rights of infants were little attended to, while the uncle had age and power with which to ſecond his pretenſions; the neceſſity there was, that the vaffal in the fief ſhould always be ready for ſervice, and which ſervice, an infant was incapable of; the extreme hardſhip upon the uncle, when primogeniture came to be eſtaſhliſhed, that his nephew, perhaps an infant, ſhould run off with the whole of the fief, whereas, in the Roman law, the nephew

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could

could have only carried off that equal share which his father should have had.

Accordingly, there is scarce an instance in Europe, till the 13th century, in publick successions, in which, upon the death of a grandfather, leaving a son of age, and a grandson under age, by an elder son deceased, the son did not take to the exclusion of the infant : for though in Scotland *, Kenneth III. brigued a contrary law from his barons, yet that law was not observed.

Nay, the exclusion of minors was so strong, that upon the death of the brother, who being major, had taken the crown, to the prejudice of his brother's infant children, it sometimes returned to those children, if they were then majors, to the prejudice of his own, being then minors. Thus in England, upon the death of Edmund I. in the year 949, his brother Edrid inherited the crown, to the exclusion of Edwy and Edgar, then minors, who were his brother's sons ; but at his death these princes being majors, the eldest of them, Edwy, succeeded to the crown, in preference to the sons being then minors of Edrid. And examples to the same purpose, are to be met with in the ancient history of Scotland.

Again, although the preference of the son had been introduced, in a competition between him and the infant grandson, yet it extended itself to the prejudice of the grandson of perfect age.

Thus Lewis succeeded his father *Charlemaigne*, to the exclusion of Barnard, his deceased eldest

* Buchanan.

brother's

brother's son, though that son was sixteen years of age at the time; neither is this mentioned as any thing extraordinary, by the historians of the age. And in like manner, in the reign of Philip the Fair, Maud succeeded in the county of Artois, to her brother Robert II. to the exclusion of Robert III. grandson, by his eldest son deceased, to Robert II. although Robert III. was of perfect age, and asserting his right: This last succession took place upon a solemn trial and judgment of all the peers of France.

There was one thing particularly which made both of these exclusions last longer, and consequently the right of representation advance more slowly: A notion in those times prevailed, perhaps borrowed from the Romans, in whose dominions the feudal nations settled, or at any rate, by no means incongruous to the situation and to the turn of thinking of such nations themselves; that when a son was provided for, or as it is termed, both in the feudal and civil law books, *forisfamiliated*, he had scarce any right to expect any thing further from his father, a consequence of which was that the grandson could expect still less from his grandfather.

Hence, in the publick successions of England, on the death of William the Conqueror, William Rufus succeeded to the crown, in exclusion of his elder brother, already provided in the duchy of Normandy: On the death of Henry I. Stephen took the same crown, in preference to his elder brother Theobald, already earl of Blois: On the

death of Richard I. John succeeded, to the exclusion of Arthur, his elder brother's son, already duke of Britany. With respect to this last exclusion, it may indeed be observed, that the right of representation being at the time of it more advanced towards its establishment in France than in England, almost the whole French lords took side with Arthur, and though the title of John was but little questioned in the first of these kingdoms, yet in France he was universally looked upon as an usurper.

The rules of publick, were the measures of private successions ; and therefore, in private successions, it is laid down upon the same plan in * Glanville, and the *Regiam Majestatem*, that when a son died, who was already provided, his son should succeed to that provision, in preference of his uncles, and to no more.

By degrees, however, this right of representation in the descending line, came on and took place, equally and at the same periods, both in private and in publick successions.

Thus in the time of † Glanville, and David I. the grandson, whose father had not been provided by his father, had the benefit of the duel, against the claim of his uncle, instead of being excluded altogether ; but when ‡ Fleta was wrote in England, which was in the reign of Edward I. the right of representation, in this competition, was

* Glanv. lib. 7. cap. 3. Reg. Maj. lib. 2. cap. 33. † Glanv. lib. 7. cap. 3. Reg. Maj. lib. 2. cap. 33. ‡ Flet. lib. 6. cap. 1, 2.

the law of the land. It is probable, that about the ſame time, it became in Scotland, the law of the land too ; for after the *Regiam Majeſtatem*, we * hear no more of this doubt in our law books, and at a ſtill earlier period, it had become the law of moſt other foreign nations.

Upon the ſame plan, again, in more publick ſucceſſions, the judgment already mentioned, in the ſucceſſion to the county of Artois, was the laſt of conſequence, that was determined on the old principle of nearneſs of blood ; for about fifty years after, Joana, grand-daughter to Arthur II. duke of Bretagne, by a deceaſt ſon, ſucceeded in the dutchy of Bretagne, to the prejudice of John, ſecond ſon to duke Arthur. In the ſame way, Richard II. ſon to the black prince, ſucceeded without diſpute, to his grandfather Edward III. to the excluſion of his uncles, who were men of great abilities, and of great power ; and in Spain, a century before, Sancho I. taking the crown on the death of his father, and thereby excluſing the ſons of his deceaſt elder brother, was excommunicated by the pope, involved in civil wars, and all his life looked upon as an uſurper.

It is no objection to tracing ſuch rules of ſucceſſion, that in the earlier ages of Europe, the crowns were generally given by election ; for if the rules of that election were eſtabliſhed, and generally followed, they were properly rules of ſucceſſion. The diſpute is merely about words ; the only difference between theſe words, is, that

* Balf. tit, heirs & ſucceſſors.

in the last case, the rule of law points out the succession in a law book; whereas, in the other case, the rule of law, in an assembly of the law-makers, did the same.

S E C T. II.

Collateral line. **S**UCH being the progress of succession and representation in the descending line, a still further progress, and from the same causes, may be seen extending itself in the other lines of succession.

Originally, none could succeed in the fief, except those who were specified in the original grant; now, as anciently, the interest of the lord in the fief, was greater than that of the vassal; and as it was a favour to this last, to give him a fief, for which he paid only, what in a military age was no great trouble to him, to wit, his personal service; he was well contented to get it to himself and his posterity; but thought not of asking the succession to his collaterals.

Nor is it any objection to this doctrine, that collaterals are observed, in the earliest fiefs, to have sometimes succeeded; for this their succession was not in a fief acquired by the vassal himself, but only in *feudo paterno*; and in a fief of this last kind, the successor took as descendant to the original vassal, and thereby *nominée* in the original grant, but not at all as collateral to the last vassal. Accordingly *, in a law in the

* l. b. 1. tit. 1. l. 9. 2. Craig. l. b. 2. dig. 15.

books of the fiefs, the distinction between the succession to the one of these fiefs, and that to the other, is laid down : “ *Frater fratri sine legitimo hærede defuncto, in beneficio, quod eorum patris fuit, succedat. Sin autem unus ex fratribus a domino feudum acceperit, eo defuncto, sine legitimo hærede, frater ejus in feudum non succedit.*” And by the promulgation of that law, it appears, that even *in feudis paternis*, the real quality of descendant to the original vassal, had been so far forgot, in the seeming quality of collateral to the last one, that a publick law was necessary to overcome the difficulty which was made of receiving such real descendant.

By degrees, however, the collateral succession gained ground. It first took place * in brothers only, afterwards it was extended to the father's brother, and in process of time, to the collateral line, even to the seventh degree. Craig † relates, that whether this succession was extended beyond that degree, was so much a doubt, as to be the subject of two contests before courts, in his time. But in the end, when wars came to be waged in Europe by standing armies, and not by vassals ; when trade, manufactures, and money, introduced luxury ; when by this luxury the great lords were impoverished, and that money was in the hands of those who had been formerly their slaves, it then became of little consequence

* Lib. feud. 1. tit. 1. N° 4.
N° 11, comp. lib. 2. dieg. 15. N° 7.

† Craig, lib. 2. dieg. 17.

to the lord, who was the vassal in the fief; and therefore he gave it to him who was willing to advance most money for the grant; the vassal, on his part again, as he gave value for that grant, was not contented with a right of succession to his descending, but insisted it should go likewise to his collateral line.

Thus by practice, without a publick ordinance, it crept into the law of Great Britain, as well as into that of other European nations; that not only *in feudis paternis*, but even in fiefs which a man had purchased himself, his collaterals *in infinitum*, as well as his descendants *in infinitum*, should succeed.

When collateral succession came to take place, it will readily occur, that difficulties could not fail to arise speedily in law, concerning the succession of a middle brother dying without children, and leaving an elder and younger brother alive.

When that happened, the law took the following course, and for the following reasons:

If the fief had come by descent, it went to the younger brother: if it was a purchase, it went to the elder.

A fief of the nature of the first kind could be in a middle brother only, in consequence of a grant from his ancestor, or in consequence of a grant from his elder brother, both of which were in construction of the ancient law deemed to be *feuda paterna*: In either of these cases, it behoved the elder brother to be either superior,
or

or heir in the superiority, and it behoved the middle brother to be vassal; but the feudal law had an aversion at joining again, without a necessity arising from the feudal relations themselves, the property and superiority in one person, when they had been once disjoined. The whole system was built on the distinct rights of superior and vassal, and the blending these two characters in one person, without the necessity I have mentioned, appeared to be the blending of contrary qualities together.

As a purchase, on the contrary, had come to the middle brother from a stranger, when the law allowed the succession of such a fief to go to the elder brother, there was no danger of the junction of the property and superiority in one person; the stranger remained superior, whoever was the heir.

So stood the law, and such was the distinction, in the time * of the *Regiam Majestatem*, and in the time of Glanville.

In England, the relations of superior and vassal having been long ago lost, the danger of uniting these two characters in one person no longer subsists; and therefore the exclusion of the elder brother *in feudo paterna*, has for many ages been forgot, perhaps ever since the end of the reign † of Edward I.

In Scotland, on the contrary, where the distinction between superior and vassal is still formally

* Reg. Maj. lib. 2. cap. 22. Glanv. lib. 7. cap. 1. † Hale's hist. p. 22).

kept up, and where many maxims, however unnecessary in reality, yet founded upon the form of that distinction, are still kept up, the distinction handed down through the writings of our * lawyers, between the heir of line, and the heir of conquest, is as perfect at this day, as it was five hundred years ago. And therefore at present, if a middle brother should die, possessed of an estate which had come to him by descent, and should have a son who made afterward a purchase, upon the death of this son without issue or brothers, the succession would split; his younger uncle would take what had come by descent; or as it is called in Scotland, the heritage; and his elder uncle would take what had come by purchase; or as it is called in Scotland, the conquest.

Represent- The right of representation, was † more
tation. slowly introduced into the collateral, than into the descending line, and consequently it took longer time to be firmly established in that line than in the other.

In the original law of nature, representation must be unknown; those who are nearest in blood to a man, will be conceived to be nearest connected with him. Afterwards, it is observed to be a hardship, that children bred up in a rank suitable to that of their father, and with a prospect of succeeding to his rights, should be cut off at once from that rank, and that prospect; it

* Balf. tit. heirs & successors. Craig, lib. 2. dieg. 15. Skene voce eneya.

† Craig, lib. 2. dieg. 17. N^o 21.

comes to be observed as a farther hardship, that a woman who has married one seemingly her equal, should by his untimely death, lose not only her husband, but see her children reduced to beggary.

These considerations bring in the right of representation in the descending, but the same considerations do not occur in the collateral line. The children of a brother or cousin, have not the prospect of succeeding to their uncle's or cousin's estates, because it is always to be supposed, every man is to have children of his own; it is therefore no hardship upon them, to be removed by another uncle, or another cousin, from a succession to which they could have no views.

Thus representation must be late of coming into the collateral line, and when it comes in, it does so rather by analogy of the other, than by principles of its own.

The steps by which, in private successions, it came into the collateral line in Great Britain, or even in any other country in Europe, are extremely difficult to be traced, and perhaps are not very certain when they are traced; therefore we must supply them by the progress of the same representation in publick successions.

In these last successions, it is plain, that representation was originally unknown: In the histories of modern Europe, for a long tract of time, wherever a succession opens to collaterals, the nearest of blood takes to the exclusion of representation.

In

In the time of Edward I. when representation in the descending line was tolerably well established throughout Europe, the point was so doubtful in the collateral line, that upon the death of Margaret of Norway, and the dispute for her succession, between her cousins Bruce and Baliol, not only the eighty Scotch commissioners, named by the candidates, and the twenty-four English, named by king Edward, were long doubtful, but all Europe was doubtful, which side ought to prevail. The precise question, in the end put by the king to the commissioners, was : *Whether the more remote by one degree in succession, coming from the eldest sister, ought to exclude the nearer by a degree, coming from the second sister ?* And on the answer, importing, that representation should take place, judgment was given for Baliol.

The Scotch writers of those days are positive this judgment was wrong ; the English writers of those days are as positive that it was right : These different sentiments are reconcilable : In England, at that time, representation in collateral succession was beginning to take place, and this advance of their own nation the English made the measure of their opinion : The Scotch, on the other hand, at the same period, had not arrived the same length ; this species of representation was unknown to them ; and therefore they disapproved of the judgment.

Solemn as this decision was, yet even in England, a century afterward, the right of representation in this line was so far from being completeat,

pleat, that it was the same doubt, which in the disputes between the houses of York and Lancaster, laid that kingdom for ages in blood. On the abdication of Richard II. the two persons standing in the right of the crown, were his two cousins, the duke of Lancaster, son of John of Gaunt, who was fourth son to Edward III. and the earl of March, grandson to Lionel, duke of Clarence, who was third son to the same prince. It was the doubt concerning the rights of these persons, and therefore, in consequence of the uncertainty, whether representation in collateral succession should take place, from which all the miseries attending that competition, ensued.

Yea, even in much later times, and when the growth of law was much firmer, it was on the same ground, that upon the death of Henry III. of France, the league set up the cardinal of Bourbon as heir to the crown, in opposition to his nephew the king of Navarre. This last prince was son of the elder branch to the cardinal, but the cardinal being one step nearer to the common stock, it was asserted, that nearness of blood, and not representation, took place in collateral succession.

For many ages, it has now been fixed in private successions, that representation in the collateral line shall take place; and although of late in Europe, there has been little dispute in publick successions, to give room for either principle to prevail, yet the example of those private successions, and the now riveted notions of mankind,

in favour of representation, will probably prevent it from being ever made again the subject of a dispute.

These notions in favour of representation, both in the descending and collateral lines, are now so strong, that we are apt to term rebels and usurpers, those who ever called them in question. History and law will convince us of our error; these will exhibit to us thousands of our ancestors dying in the field, in a prison, or on a scaffold, for rights which once were real, though we measuring every thing by our present notions, superficially imagine they could never exist.

S E C T. III.

Ascend-
ing line. **I**F in the origin of fiefs there was any difficulty in admitting collateral relations to succession, it will readily occur, that the ascending line must have had still greater difficulty to be admitted. A man who was sufficiently obliged by getting a fief to himself would little think of asking it for his ascendants; these ascendants too, it was not natural to suppose, would survive him; and above all, it could not fail to occur, that a grandfather, or great grandfather, would have been but very useless vassals, to be offered to a superior.

Thus it came to be a rule in fiefs, that they always descend, but never ascend; a rule laid down in the books of the fiefs, and for a long time observed in the feudal law of all Europe.

This

This exclusion of the direct ascending line went so far both in England and Scotland, that the succession passing by the father, went to his brother the uncle *; after which, if that brother entered, and died without children, it might indeed return to the father; but then it returned to him, as brother to the uncle, and not as father to the son. This regulation, by an unaccountable tenaciousness of the English to single points of doctrine in their law, when their genius and circumstances have made them overturn in general the doctrines themselves, subsists to this day.

In Scotland †, Craig, who wrote about the year 1600, relates, that in the case of the earl of Angus, which was decided a little before his time, the ascending succession had been debarred. From him too it may be gathered, that the decisions were taking a contrary turn, at the time when he wrote, although he always favouring the old law, disapproves of them. Skene asserts likewise, that a father ‡ cannot be heir to his son: And Balfour §, treating of all the lines of succession in use when he wrote, takes no notice of this line.

Soon after the age of these authors, however, the succession of ascendants in their order, was as universally received into the Scotch law, as that of either of the other two lines in their order. In short, the succession of all relations whatsoever,

* Reg. Maj. lib. 2. cap. 25. 31.

13. N^o 47.
successors.

† Skene voce ereya.

† Craig, lib. 2. dieg.

§ Balf. tit. heirs &

if not excluded, continually took place. And thus fiefs, which originally were a right of possession of the land only as long as the lord pleased, and which afterwards were a right of usufruct during the vassal's life; are now, in point of succession, a right of property, to him and to all his heirs.

Half blood. In both the collateral and ascending lines, so far as the ascending line can take place in England, there is a remarkable difference between the laws of England and of Scotland; to wit, that in the first country half blood is excluded altogether from the succession of lands; whereas, in the other it is only excluded by the whole blood.

On this head, anciently in England, the following distinction was made:

A fief was either a late purchase, or had descended from an ancestor: if it was a late purchase, the half blood was totally excluded: if it had descended, and the vassal was entered in it, it is probable, that originally the half blood was admitted; because that which was only half blood to him, was whole blood to the ancestor from whom the estate came: but whatever way the law stood originally, it appears, that * in the time of Bracton and Britton, it was made a dispute, whether in this last case the half blood could take the succession.

But that dispute came to an end; the principle on which the claimant by half blood had founded his claim, was, that he could deduce his pedi-

* Hale's hist. 232.

gree through ancestors, from the first acquirer ; but in a long course of ages, it became impossible, or difficult for him, to prove such connection ; and therefore the law established a rule, that the last actual seisin should make the person seised the root of descent, equally to many intents, as if he had been the purchaser. From this rule it followed, that in the question in hand, the half blood could * no longer pretend to be admitted.

In Scotland we have followed a middle course, between admitting or excluding the half blood entirely ; in competition with the whole blood, in the same degree, we exclude it ; in competition with the whole blood, in a remoter degree, unless representation interposes we admit it.

From the train of these papers, it will *Women.* be easily imagined, that women at first were not admitted to the succession of a fief.

In all barbarous ages, where courage and strength of body are more necessary than the virtues of the mind, the rights of women must be but little regarded.

In the more ancient period of the Athenian and Spartan states, women were excluded, as long as there was a male of the same degree existing.

In Rome, before the time of the twelve tables, women were likewise excluded ; nor is it even certain, that they were admitted by these tables ; on the contrary, it is probable they were first admitted by the equity of the prætor, correcting

* Bacon voce descent. (C.)

the harshness of the ancient law, and by his edict *unde cognati*.

In the ancient feudal ages, to the barbarity of the times there was added, the nature of the services to be performed by the vassal, and which women, from their weakness, were incapable of performing.

Hence, in the Salick law, they were excluded altogether: hence the books * of the fiefs exclude them and their posterity, if not expressly mentioned in the original grant: hence † all feudal writers agree in the maxim *natura ab omni feudo fœminas secludere videtur*: Hence, in publick successions, except in Spain, where, by reason of the inundations from Africa, the system introduced by the German nations, had not the same vigour that it had in neighbouring countries, they were in the earlier ages, throughout all Europe, overlooked.

In these last, to wit, the publick successions, the neglecting of women went so far, that among the Goths, even the infant grandson was preferred to his mother; for on the death of Theodoric, his infant grandson Athalaric succeeded, to the exclusion of his mother Amaluzonta.

But when the original barbarity of the feudal nations, yielded in the natural course of things, to a greater softning of manners; and when many of the military came to be converted into foccage, or burgage fiefs, the rights of women came to be attended to, and regarded.

* Lib. feud. 1. tit. 1. N^o 3. & lib. 1. tit. 8. lib. 2. dieg. 14.

† Craig

It is probable they were first admitted into socage, or even into burgage fiefs; for in these the offer of performing the duties by another, would have been no injury to the lord; and from thence, it is likely, their right of succession was extended into military fiefs.

In England, unless excluded by the patent *, they were admitted to a peerage; in Scotland, unless admitted by the patent †, they were excluded from it. The quicker progress of society in the one nation than in the other, accounts for the difference.

With respect to other inheritances, though they be admitted to them; yet the remains of their former exclusion are in the very midst of their admission to be seen.

Thus in the descending and collateral lines, though they are admitted, yet the order in which they are received, is still removed as far as possible; they are not attended to, till the whole male order, in the same degree, has failed: And indeed, in these lines, our ancestors have considered, the admission of them at all, as so subversive of all feudal notions, that in forming the rules of succession in their favour, they have not even applied the common feudal principles, but instead of establishing among them the right of primogeniture, have let the succession to the fief go equally, by the ancient law of nature among them all.

* Bacon voce coparcenars. (C.)

† Case of lord Lovat.

In the ascending line again, although in England the rule *materna maternis* takes place, yet in a descent to a son from the father, the mother shall never succeed; and even to a purchase by a son, the mother shall not succeed, as long as there is one relation left on the side of the father. In Scotland we do not even admit succession upwards on the side of the mother at all; so rigid is the law in this respect, that the king shall take as *ultimus hæres*, to the exclusion of a person's nearest relations by his mother.

When the feudal branches are lopped off, or even when the trunk is cut down, it still takes a very long time, before the roots from whence they sprung, can decay.

CH A P. VI.

HISTORY of the

FORMS of CONVEYANCE.

THE forms in which property is transferred, must vary with the nature of the right enjoyed by the person from whom the transfer proceeds: it will therefore equally gratify our curiosity, both as philosophers and lawyers, to trace the congruity between the feudal forms and the feudal rights, through the three great channels of conveyance, the deed of the party to take effect either immediately, or to take effect after his death,

death, attachment by force of law, and making title by descent.

S E C T. I.

THE history both natural and feudal of the first form of conveying property, seems to go in the following gradual and regular progress.

Voluntary Conveyance.

The notion of property it has been seen was originally created by the long connection of a person with the thing which he occupied, the affection which from that connection he had conceived for it, and the hardship which it was conceived there was in breaking that connection and disappointing that affection.

Natural progress.

It was these circumstances which at first gave to the person who had long lived upon one spot of ground, the property of it: It was these, which for so many centuries in Europe, gradually strengthened the rights of vassals in their lands against their superiors: It was these, which converted the rights * of copyholders in England, and of rentallers in Scotland, both originally no more than rights of possession, to be at this day both of them rights of property.

Property being founded originally upon such principles, it is not easily conceived among a rude people, how it can be transferred to another so as to be vested in him, until there is evidence that the connection as well as the affection of

* Craig, lib. I. dieg. II. No 24.

the former proprietor is ceased. Hence the rule *Nudo consensu dominia rerum non transferuntur*, must in such a state of society take place; the *emissio verborum* in the act of consent, affords indeed presumptive evidence that the conveyer's affection in the property is ceased; but as that *emissio* is a sound and no other thing, it is not a proper medium to dissolve the corporeal connection between the proprietor and the subject, and much less to create a corporeal connection between that subject and another person; a different medium in conveying is therefore requisite, to wit, that of delivery; delivery gives further evidence, that the affection of the conveyer is likewise ceased, for as it breaks his corporeal connection with the subject, so it also carries the mind to connect it with another, and justifies that other in conceiving an affection for it.

The first subject of property is moveables, and these from the facility of moving them were transferred *de manu in manum*: again, when men came to transfer the next subject of property, to wit, immoveables, these were transferred by putting the intended new proprietor into possession, by placing him in, or upon the subject itself. In the antient burrough laws of Scotland it is said, if any one sell his house, the seller shall stand within the house and come out of it, and the buyer shall stand without it and enter. The same likewise was the regular method of conveying a house antiently in England.

In the transfer of both moveables and immoveables, at first, in order to fix the remembrance of what had been done, many witnesses were called, many ceremonies used, and magistrates resorted to. Abraham in the patriarchal ages, bought the field of Macpelah before the whole people: In the very old * Roman law, not only the ceremonies in conveying immoveables were very numerous, but even such moveables as were *res mancipi*, that is moveables of value, were transferred before a magistrate: and among † the Lombards, ‡ Saxons, and § Normans, most deeds in law and even sales of moveables were made good before a magistrate.

Afterwards, the trouble in some cases, and the impossibility in others, of delivering actual possession, made the introduction of symbolical possession necessary.

Thus, the land of Elimelech many ages after the patriarchal one, was conveyed to Boaz by the delivery of a shoe, and calling the elders with the people to witness. And land in England is now transferred by delivery of a twig or bough, and in Scotland, by that of earth and stone.

When in the further progress of Society writing comes much into fashion, many of the set forms of ceremonies give way to set forms of writing in conveyances. Hence, in a more refined state of the Jewish nation, Jeremiah buys

* Heinec. Roman. antiq. lib. 2. tit. 1. N. 19. and 20. † Leg. Longobard. lib. 2. tit. 18.

‡ Leg. Illot. and Ead. N. 16. § Leg. Gul. 1. in Wilkins, p. 218.

the field of Hamamiel, by writing, sealing, and witnesses; hence conveyances in writing come to all polished nations whatever.

Feudal Progress. These set forms, whether of ceremonies or of writing, must prevail more in the feudal, than in any other law; because in the conveyances under other laws, all connection between the grantor and grantee, unless what arises from particular covenants and qualifications, are at an end, on completing the grant; whereas a feudal grant is subject not only to the like covenants and qualifications, but to a great many more, from the relations between superior and vassal.

As the most ancient grants in Great Britain as well as in other countries, were gratuitous on the part of the superior, who, retaining in himself the *dominium directum*, gave only the *dominium utile* to the vassal; so by the interposition of homage and fealty they were * given with much state on his side, and received with much humility on that of the vassal: at the same time, to make both impressions stronger, as well as to keep alive the remembrance of the grant, possession was delivered by the superior himself, which was called *investitura propria*, in presence of the *pares curiæ*, and on the land itself, though without writing, as writing was at that time but very little known.

* Lib. feud. passim. cujac. comment. in lib. feud. 1. tit. 1. p. 18. edit. 1566. form. anglie. dissert. p. 1, 10, 11, 21, 26. Craig, lib. 2. dig. 2. N. 13. Skene voce Homagium.

In Scotland, so late as the time of Craig, * that author informs us, that in the mountainous parts of the country, the superiors themselves delivered possession of the lands to the vassals without writing, and before the *parcs curiæ*. And conveyances made good by livery, and without writing, took so firm a root, that the frequent use of them † remained in England till they were abolished by a statute in the reign ‡ of Charles II. which ordained, that parole conveyances should extend no further than to an estate at will, or a lease for three years.

However, in most lands, as soon as the fiefs ceasing to be personal came to descend to the heirs of the vassal, there could not fail frequently to occur upon the death of a vassal, a defect of proof as to the origin and conditions of the grant. Vassals to remedy this, applied to superiors, and prevailed upon them to give in writing, what in the books of fiefs is called § a *breve testatum*, declaring the tenour of the *investiture*: To this testification there was no date, nor did the witnesses sign it, and as the interests of mankind were at that time extremely simple in themselves, there were no involved qualifications annexed to it.

Rude and unformal as these writings were, they are the origin of the charters which are used at this day: and Craig || informs us, that even in

* Craig, lib. 2. dieg. 2. N. 16. † Bract. lib. 2. cap. 16 N. 1. Flet. lib. 6. cap. 34. sect. 1. ‡ An. 29. C. 2. cap. 3. § Lib. feud. 1. tit. 4. Craig, lib. 2. dieg. 2. N. 16. || Craig, lib. 2. dieg. 2. N. 16.

the low countries of Scotland, fifty years before his time, there were vassals, who instead of the present formalities of conveyance, were contented with the *breve testatum* from their lord.

This gradation from the most ancient form to the use of the *breve testatum*, and the variation in the points of that gradation, according to the ancient division of Scotland in the progress of society, into the low-lands on the one part, and into the high-lands and border lands on the other, is most curious, as marked by Craig: “Hujus
 “ nostræ observationis exempla adhuc habemus
 “ apud nos (neque enim omnia antiquitatis vestigia
 “ adhuc exoleverint) *nam in limitaneis regni partibus et inter montanos*, nostro ævo propriam investituram retinebant, cum dominus in loco
 “ feudi constitutus possessionem tradebat sine
 “ scripto; *in locis mediterraneis*, his quingentis
 “ annis elapsis, breve testatum, quod nos chartam
 “ dicimus, soliti sunt vassalli a dominis accipere,
 “ quo se investisse vassallum domini significabant;
 “ quæ merito breviter testata dici poterant: nam
 “ si quis monumenta antiquarum familiarum excusserit, brevissimas chartas has compendio-
 “ samque earum formam reperiet.”

When writing came more fully into use, these declarations came to be so much extended, as to contain more clauses than they had originally contained words; for as the power over property from the progress of society grew more extended, and as the interests of mankind from the same progress grew more involved; these conveyances were

were clogged with qualifications, conditions, and covenants, extensive as the powers, and various as the interests of mankind.

This extent of society made men less fond of that feudal pageantry which had arisen only from a more narrow state of society. In consequence of this, homage and fealty were dispensed with; and superiors, instead of delivering possession themselves, gave orders * to their bailiffs or attorneys to do it; and any witnesses signing, though not *pares curiæ*, were sufficient. And thus the † improper investiture was established.

In England these investitures when reduced into writing, were executed by feoffment and livery, and in Scotland, by charter and feisin.

As long as the possession was given before the *pares curiæ*, there was a necessity for the livery of each particular manor, because those who were *pares curiæ* to the investiture of one manor, were not *pares curiæ* to that of another.

But the introduction of symbolical delivery, and the dispensing with the *pares curiæ* as witnesses, made people more remiss in requiring livery of each particular parcel of land. Hence, in ‡ England, at present, if a man seised of many villis in one county, makes a feoffment of the whole, and gives feisin in one vill in name of the whole, all the lands of the feoffor lying in that county shall pass: Hence in Scotland, in an erection of

* Mad. form. Angelic. dist. p. 10. & notæ (M.) † Mad. form. Angelic. & Craig. loc. citat. ‡ Coke, Lytt. 253.

several parcels of lands with a clause for their union, feisin of one parcel shall be feisin of the whole barony.

Such were the forms of original grants ; in derivative grants the forms necessarily admitted some variations.

In an original grant, nothing but a charter by the giver and delivery to the receiver was needed : but in a derivative grant, as antiently the vassal of himself could not alienate, there was besides the vassal's grant, further need either of a confirmation by the superior, or of a surrender into his hand, if the fief was to remain with him, or of a surrender to, and new grant from the superior, if it was intended to be transferred to another : And accordingly, in the * *formulariæ anglicanæ*, there are a multitude of examples, of such confirmations and surrenders in the ancient law of England.

But afterwards, the statute *Quia emptores* in England, took away the distinction between an original and a derivative grant, for as it allowed a free alienation, and made the donee hold not of the donor, but directly of the chief lord, it removed the necessity † of confirmation by the chief lord, or of surrender to him. In Scotland, on the contrary, as that statute did not take effect, superiors claimed a title to bar alienation ; their consent then continued to be sought, and needed ;

* Mad. dissert. p. 10, 26, et ibid. notæ C. D. et loc. cit. in notis et tit. confirmation and release. † Mad. form. Anglic. dissert. p. 4.

and in consequence of this, the forms of original and derivative grants remained in the law; so that now in these last, where the grant is in favour of a third person, the gift, and the possession, the charter and the feisin, appear in point of form, to proceed from the superior, in the same manner, as if the grant had been from him, gratuitous and original.

Not only so, but a proprietor of an estate cannot complete the smallest alteration in the settlement of his estate, without application to the superior in the antient strict and regular forms.

To this ancient strictness our judges adhere so rigorously, that in * a late case, in which, upon the death of an ancestor the heir not entered, had procured from the superior, a charter *de novo*, altering the former course of succession; they found the alteration not effectual; and were of opinion, that the superior, being by the original grant divested of his property, could make no new grant till he was re-invested in it: for which reason it was held, that the heir ought first to have got himself infeft on the ancient investitures, then resigned in the hands of the superior, and after that taken the new limitations as he pleased.

The power of alienating to take effect only after the death of the grantor was so much supported, and needed so much to be supported by the forms which ushered it in, without its being almost perceived,

Al ena-
tion to
take effect
after death
of granter.

† Landales against Landales, 12 June 1752. (4 collectors.)

that the same chapter of this work which has marked the progress of that species of alienation, must have marked likewise the progress of the forms in which it was made good.

S E C T. II.

Involuntary conveyance.

THE involuntary transfer of land property by force of law, happens two ways, either by forfeiture, or by attachment for debt.

As only the king or the lord was interested in the transfer by forfeiture, so anciently in the law of England, and possibly in that of Scotland, the transfer was made good by the immediate seizure of the subject forfeited.

This was agreeable to the genius of the feudal system; for that system went on the general plan, that wherever there was a deficiency of a vassal, the fief should revert to the lord; which rule had originally taken place in escheats, when the property and superiority were reunited; and took place likewise, even when the deficiency was only a temporary one, as during the interval between the death of one tenant, and the entry of another.

These last contingencies gave more frequent opportunities for the application of this rule, than the emergencies of forfeiture; and therefore it was first in the cases of non-entry and escheat, that the severity of the regulation was checked; for in England, the lord, as has been seen, lost the power of taking possession at all upon the death

death of a vassal: and by a statute in the reign of Edward I. the king was restrained from taking possession, either upon the death or escheat of a vassal, till an office was found. This restraint paved the way for restraining the king's power of seizure on forfeiture; it readily occurred, that if the king's power of seizing upon the death of a vassal or the failure of an heir was dangerous, his power of seizing upon forfeiture, was still more dangerous, and as he was restrained in the two first cases by the necessity of having an office found, it appeared that he ought equally to be restrained in the latter.

Between these suggestions in favour of the necessity of an office on the one hand, and the king's ancient right against it on the other, it appears, that the law of England † was unfixed for some time; but at length, the following distinction was made: If the person attainted of treason died, his lands were vested in the king without any office, because by the attainder, there was no heir to claim; but on the contrary, when the alledged offender was alive, who might have injustice done him by the seizure, it was agreed that his lands were not vested in the king till an office was found.

A statute of * Henry VIII. however, put an end to this distinction in attainders of treason, and declared, that the lands of persons so attainted, should be vested in the king without any of-

† Viner. rit. office (D.) & loc. ib. cit.

* An. 33. H. 8. cap. 20.

fice; at the same time, as this statute relates only to attainders of treason, so the common law † in other cases is left on its ancient footing.

In Scotland, the law took a different course. When the forfeiture was in parliament, the estate was indeed directly vested in the king; but in other forfeitures, the king could not seize till he had brought a declarator or action of declaration of the forfeiture. As there was once a time when the law of Scotland required no declarator in the cases of non-entry or escheat, it is likely that the introduction of it on these occasions, paved the way to the introduction of it in the case of forfeiture.

Another difference occurred between the customs of England and Scotland; in the first of these countries, whatever was forfeited or escheated, was levied by the king's officers, and accounted for to him. In Scotland, on the contrary, the king almost constantly made gifts both of the forfeitures and of the escheats. In England, the subordination of superior and vassal having soon ceased to be strict, there seemed no incongruity in the king's holding an estate by forfeiture, which the forfeiting person had even held of another; but in Scotland, that subordination remaining entire, it was deemed an inconsistency in the king to hold an estate which was in vassalage to another superior: and the custom of making gifts of such estates, probably led the way to making gifts of almost all other estates that fell

† Staundf. prerog. cap. 18.

to the crown by forfeiture or escheat ; and perhaps the greater necessities of the nobility in Scotland, than in England, together with the subjection in which the king was kept to his nobles, extended and established the practice.

This difference in the customs of the two nations, insignificant as it may appear, led to consequences that were terrible in Scotland. As the great families who remained were to enjoy the spoils of those who were forfeited, they were very ready to thunder out their dooms against each other ; and on the other hand, as a pardon after the gift did † not restore the estate, all access to mercy was shut up. In consequence of which, for ages, this land was torn in pieces by a nobility on the one hand greedy, and on the other hand driven to despair ; and by a race of princes, many of whom, in order to protect themselves, played the mutual furies of both against each other.

The late British statutes are bringing the laws of Scotland and England nearer together, both on the contingencies of forfeiture and escheat. By the vesting acts of 1715 and 1745, the forfeited estates are vested without any office of inquisition, and without declarator. The clan act made the superiority to be vested in the loyal vassal, without declarator of forfeiture, and the property to be vested in the loyal superior without declarator of escheat ; and by the late vesting act,

† Scots acts, an. 1606. cap. 4.

the estate of the forfeiting vassal was understood to be vested directly in the crown, though holding of a subject superior.

Attach-
ment for
debt.

The manner of making the transfer good upon attachment for debt, was originally the same both in England and Scotland. The attachment was made good by a petition to the king or the king's judges, who upon that issued an order to the sheriff to deliver possession.

But in the form of delivering this possession, a difference arose between the English and the Scotch law: in England the sheriff delivered constantly the seisin, whether the land was held of the king or of the lord: as the lord's connection with his vassal came early in England to be but slight, he interested himself but little in the attachment; the statute *Quia emptores* too taking effect there almost as soon as the attachment of land, it appeared no hardship upon the lord, to have that tenant put in by the sheriff, who could have been forced upon him by the voluntary conveyance of the debtor; but in Scotland, where the connection between lord and tenant remained strict, the lord thought he had a right to interest himself in the attachment; and as the statute *Quia emptores* went into disuse, the lord often refused to accept for tenant as attacher, him, whom he could have refused as voluntary disponent. In consequence of this, the infeoffment of the sheriff, except in lands holden of the king, would have been to no purpose; seeing the debtor would still have continued immediate tenant, and he

he and those in his right remained subject to the incidents due to the lord. In order to avoid those incidents then, it became necessary in Scotland for the attacher to receive seisin from the lord, if the land was held of him: and accordingly in the law * of Alexander, though it is the sheriff who sells, and in the statute of † 1469, though it is the sheriff who comprises, yet it is the lord, when the lands are held of him, who infeoffs. In the last of these statutes, a privilege granted to the debtor is clogged with this burden: " he payand the expences made on the over-lord, " for charter, seisin, and infeoffment."

From that day to this, in Scotland, the form in which the law transfers land from the debtor to the creditor, remains the same; for though a variety of means have been used to force the lord to infeoff, or in some cases to render his infeoffment unnecessary; and though since the late statute of the 20th of the present king, the lord can refuse no person attacher who is within the meaning of the statute, yet even independent in fact as the creditor is of the lord, he must still in point of form apply to him, and from him seek possession. The grant is made by the lord, the seisin is delivered by him, and his power alone, not the operation of law, appears in the form of the transfer.

Again, with respect to the attachment of land for the debt of the ancestor, the novelty of the

* Alexander 24.

† An. 1469. cap. 36.

attempt

attempt to reach land for such debt, could not fail to be attended with embarrassments, and variations in the form of doing it. It has been seen, || that this attachment first took place among trading people, by the statute merchant in England, of Edward I. which declared, "that if the debtor died, the merchant should have possession of the lands," and by a similar statute together with the laws of the burroughs in Scotland. Now it is probable, that at first, upon the strict words of the statute of Edward I. the land was directly attached without taking any notice at all of the heir, although the method came afterwards to be changed, and the * heir was sued for the assets descended to him. It is certain in Scotland, that at first, the creditor attached the lands of the deceased debtor directly, without any previous constitution of the debt against the heir, or any charge to enter heir. This appears from some ancient deeds, in which the bailiff † either gave to the creditor in a burrough, the brief of distress, directly against the inheritance of the debtor, or only ‡ called the heir upon his *jus retractus*, to assert his preference, and to redeem the lands if he pleased. But this method came afterwards to be changed, as it had been changed in England, and a decree of constitution was previously used against the heir.

|| Hist. of Alienation, sect. 2.

* Bacon voc. heir and ancestor (B. 2.)

† Instrumen. Sas. Thom. de Forrest, Jan. 29, 1450.

‡ Record. Charters, lib. 16. N. 77. Jan. 29, 1508. Cart. Ricardi Kine.

The singular effect of the heir's renunciation in Scotland, was remedied, as has been seen, * by the introduction of the adjudication *cognitionis causa*. The singularity of the remedy was attended, as all novelties must be, with variations in the form of making it good. According to Sir Thomas Hope †, the superior was originally made the defender in this adjudication, the heir being called only for his interest, and decret was given against the superior solely. This was natural at a time, when the lord's interest was extremely strong in the fief; but at present the process is directed against the heir alone, without even calling the superior; and by the decree the land is adjudged from the heir directly to belong to the creditor. This is equally natural, at a time when the interest of the vassal in the fief is become stronger than that of the lord. Again, originally, the decree against the superior was only personal, ordering him to infeoff the creditor in the land for payment of his debt, but gave no real lien directly on the land: and perhaps the judges at first thought, they had made stretch enough, in giving this personal decree; but now, from the ripening of the diligence, and the favour of creditors, direct access is given to the land, and a real lien created on it by the adjudication.

* Hist. of Alienation, sect. 2.
p. 353. Kaims hist. notes, N. 1.

† Hope minor practicks,

S E C T. III.

Making
title by
descent.

THE forms of taking an estate by succession, proceeded originally upon the same plan of connection between superior and vassal, on which the other forms of conveyances proceeded.

In the ancient constitution of a feudal grant, the lord gave the fief to the vassal, under the express condition, that certain services should be performed or duties paid to himself; and under an implied condition, that when the vassal failed in his part of the obligation, the fief should return to the lord. In consequence of this, when the grantee died, the property of the land returned to the lord. Afterwards, when the rights of the vassals gained so much upon those of the lords, that fiefs descended universally to heirs; yet still the old form founded on the old right, so far remained, that on the death of a vassal his fief returned into the hands of the lord; but then the lord on his part, was understood to be subject to an obligation which he could not defeat, of renewing the grant, in the person of the vassal's heir.

In the old laws therefore both of England and Scotland, the vassal, in order to make title to the fief of his ancestor, was obliged to apply to the lord, and to get a renewal of the investiture from him: and indeed this notion of a right of reversion in the superior, went at one period so far in both

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both kingdoms, that the heir not being supposed to take through the ancestor, but directly from the superior, was not subjected to the debts of his ancestor; and in Scotland, at a much later period *, the renunciation of the apparent heir even when the deceased vassal had left creditors, would have sent back the property of the fief to the superior, and disappointed the creditors altogether.

In England, by the time † of Henry II. the rigorous dependance of the vassal, upon the lord had so far ceased, that the vassal, provided he paid the *simplex fasina*, or relief, could have taken up the fief without applying to the lord.

But even then, the king continued in possession of his old right; upon the death of the vassal he took possession of the land, and the heir could not enter into possession, till he sued out a livery, by means of a service upon the brieve or writ *diem clausit extremum*; the right of the king in the statute *de prerogativa regis* is described, *post mortem, &c. capiendo omnes exitus, earundem terrarum et tenementorum, donec facta fuerit inquisitio; sicut moris est, et ceperit homagium hæredis*. And the writ of *diem clausit extremum*, whereby this writ was put in execution, ran thus, *cape in manum nostram, omnes terras et tenementa, &c. donec aliud inde præceperimus, et per sacramentum proborum hominum diligenter inquiras, &c.*

* Kaim's hist. notes, N°. 1. and 3.

† Hist. of tenures, sect. 2.

In Scotland, as the dependance of the vassals on the lords remained strong ; not only the king, but the lords retained their ancient right. As soon as a vassal died, his lands became open to the superior, or as the law terms it, fell in non-entry ; to him the heir of the vassal was obliged to come, and from him sought entry : If he was a subject superior, as every such superior is supposed to know all his vassals, he generally granted a writing, called from the narrative of it, a precept of *clare constat*. This writing declared it was known to him, that the claimant was next heir to the vassal last deceased, &c. and therefore ordered the bailiff to deliver him possession of his predecessor's land : but if the king was superior, as from the multiplicity of his vassals and the cares of government, it was impossible he could be acquainted with all his vassals, he referred the question of the right of the claimant, to the cognizance of an inquest, by a brief or writ out of the chancery, which is the king's great charter room, and anciently was ambulatory with him. Upon the report of this inquest in favour of the claimant, returned into chancery, a precept was issued from it by the king's officers, who did now, by their office, what the king it is likely more anciently did in his own person : this precept ordered seisin to be given to the claimant, was directed to the sheriff, who is the king's bailiff, and was by him executed.

The same ceremonies in the transmission of common estates, and similar ceremonies in the transmission

mission of burgage estates, remain in Scotland, in favour both of the king and of the lord, to this day. And founded on these ceremonies, which suppose a right of property in the superior, but subject to an obligation of renewal in the person of the heir, which cannot be defeated; it is now maintained by some lawyers in Scotland, that the renunciation of an heir before he is entered, although a renunciation is not a proper mean of conveyance, yet is sufficient, where the interest of creditors does not oppose it, to vest the property of the estate compleatly in the superior, or rather to disburden that estate, which was before deemed to be in him, of the incumbrance which affected it in favour of the heir.

Whether this opinion be just I do not enquire. In giving a history of the law it is sometimes necessary to give a history of the opinions of men as well as of the law itself.

In England, the same form of an heir's taking a military, or socage estate, in capite, rather from the superior, than through his ancestor, remained, with only such differences, as the different offices and officers of the two kingdoms created, as long as the court of wards and liveries remained; for the king*, as has been seen, took possession upon an office found, and the heir was obliged to sue out a livery, before he could recover it.

Such is the progress of the feudal forms of conveyance by deed of party, to take immediate

* Staundf. prerog.

effect, or to take effect after death, by attachment of law, and by making title in descent. In all of them, the connection between the feudal rights and the feudal forms, and a regard to the interest of the superior, even when the fief is continuing to pass from him, may be traced.

In the end, however, when a very extensive degree of commerce, causes a continual fluctuation of land-property; and that fluctuation arises much more from onerous, than gratuitous causes; the connection between the grantor and grantee, and between this latter and the grantor's superior, comes to be but slight: the dispatch of business at the same time so necessary in extensive dealings, cannot admit the slow forms of a grant from one person, and of an after application to another. These feudal forms therefore give way to other forms, more accommodated to the natural state of mankind.

Property comes then to be transferred, when by deed of party, in no other ceremony of words, than is sufficient to show the intention of the grantor. This intention, for the sake of evidence, is generally indeed though not always expressed in writing, and the transfer, though often attended with possession, is sometimes however made good without it.

Thus in England, although originally conveyances by deed of party were executed by acts of infeoffment; which, as will appear from a comparison of * Madox and Craig, correspond in their

* *Mad. form. anglic. dist. p. 11. & alibi. Craig, lib. 2. dig. 2. nature*

nature and progress to our charter and seisin ; or by fines, which were originally an acknowledgment of such feoffment in a court of record ; yet earlier than the time of Lyttleton, it had come into fashion, to transmit land by attornment, if there was a tenant, and by lease and release, if there was none ; in the first of which cases, the form of getting the consent of the tenant of the ground to the transfer, supplied the place of that livery, which could not be given ; and in the other case, the grantor gave to the grantee, an imaginary lease, in order to put him into possession, and the next minute released ; or in the language of the law of Scotland, renounced all right or interest he had in the land.

In attornment something was done to supply the want of livery, and in lease and release the entry gave livery ; but a statute of * Henry VIII. by making provisions concerning a form of conveyance, which had been before in use, enabled people to dispense with these two shadows of a form, and with the circuit of a feoffment altogether. The form of conveyance by bargain and sale, made secure by writing and enrolment, by virtue of this statute, corresponds to our disposition, without infeoffment in Scotland : This last with us does not transfer ; it is only a step to the transfer ; but in England, on a bargain and sale, all notion of a superior or delivery is lost ; the moment the deed is inrolled, the estate, to almost all effects whatever, is vested *ab initio* ; nor can

* An. 27 . H . 8 . cap. 16

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there be any dispute between competitor purchasers, except what arises from the dates of their respective enrolments. And so much did the English in this form of conveyance dispense with the strictness of forms, that till the statute directing the enrolment, lands might have been conveyed by even a parole bargain and sale; and even after this statute, as the easiest forms of conveyance take place always in boroughs before other places, it still remained allowable, till a statute * of Charles II. by bargain and sale, to convey lands, by parole, in cities and boroughs.

In Scotland we are so far approaching to a moderation in the rigour of our forms of conveyance, that though in the strict feudal notions no one could grant to another what was granted to himself, till he was seised in it, yet at present a man can assign over his author's personal obligation to dispoise in the disposition, before he is himself infeoffed; and for a long time, a personal disposition without infeoffment, was preferable to a posterior disposition, though attended with it.

Upon the same plan of facility of conveyance, instead of the circuit of a disposition *de presenti*, and seisin upon it, a man may at present, in England, devise a land estate by a mere testament, with the same ease, with which he may devise the most inconsiderable sum.

* An. 29. C. 2. cap. 3. Bacon voce Bargain & Sale (C.) N^o. 1. & note.

In the same manner, in the attachment by law at present in England, the judgment of law only appears. The feudal forms, except in the transmission by escheat, are not even to be traced in it. The land changes its master with as few ceremonies, as land originally allodial could have done. On forfeiture it is vested as often in the publick as in the king; and on attachment for debt, the creditor is obliged to apply to none but the judge.

The transmission of succession *ab intestato*, has had the same fate; the heir, instead of application to the superior, rather continues that right which his predecessor had, than acquires a renewal of his predecessor's right, and now takes the estate in the same way, that in the Roman law a Roman would have done: That is, he takes it by any overt act, showing his intention to do so.

The form of taking an ancestor's estate through the superior, was the last feudal form of conveyance, that was kept up in the law of England; but the same statute, which by abolishing the tenures by knight's service, abolished so great a number of the private rights of the feudal system, put an end to the almost only remaining feudal form of conveyance in it. And thus those rights, and those forms, which arising from the peculiar circumstances of a rude people, absorbed in themselves all other rights, and all other forms; which for so many centuries in Europe, were a continual bond of union, and yet a continual source of wars; which by one general tenor, subjected to
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the same rules, princes and subjects, kingdoms and private estates; that system, which by the simplicity and consistency of its principles, so long flourished, and is still so much revered; fell not at once, but by slow degrees: Every age impaired some part of the fabrick, till in the end, unnatural, though well compacted and dependant as it was, it gave up most of its particular rights to the natural equality and police of society, and submitted its peculiar forms to the dispatch and ease required in the extended, varying, and intricate dealings of mankind. At what period we shall arrive at the same state in Scotland, is uncertain; but it is certain we have been for some time fast approaching to it; and as almost every nation in Europe, has run, or is running the same course, it is not probable that we shall be the only exception to that chain of causes and effects which is always the same.

One difference, a considerable and a curious one, may be observed in the different channels, which the declension of the feudal law has taken in England and in Scotland. In the first of these countries, the transmission of land-property through the feudal forms, had gone into disuse, when yet many of the most rigorous feudal rights remained in the dependency of tenure by knight's service: In Scotland, on the contrary, the dependency of this last tenure has been abolished, though yet the old forms of transmissiion universally remain over the country.

In England, the great commerce, and frequent fluctuation of land-property arising from it, made the embarrassment of the feudal forms of transmission too inconvenient to be born with; while, on the other hand, the power of the king, and of the great families, supported the military tenures, with the solid interests to themselves arising from them. In Scotland again, as the power of the nobility is visibly decayed, they have not been able to support the dependency of a holding, which has been esteemed so detrimental to the rest of their fellow-subjects; while, on the other hand, we have not yet arrived at so extended a commerce, and consequently frequent fluctuation of land-property, as to make the embarrassment of the feudal forms of transmission, be very sensibly felt.

When from a greater extent of commerce, these embarrassments come to be more sensible, we shall probably come to sell lands by a form similar to that of bargain and sale. We shall devise lands by testament, not by a disposition *de presenti*. Our adjudications will be completed without acknowledgment of the superior. The heir will take his ancestor's estate by entry, not by service and charter. And as there is already an union of kingdoms and of interests, there will probably be in these respects, in future generations, an union of forms and of laws.

S E C T. IV.

Records.

FORMS of conveyances are to be regarded, almost only in proportion as they give security to purchasers and creditors: Hitherto they have been traced, as recurring to, or deviating from feudal principles; but in this section we shall enquire, how far the forms of conveyances in Great Britain, have a more intrinsic and independent value, as conferring security upon purchasers or creditors. Perhaps the digression will be pardoned, in consideration of its importance.

It is not a little to be wondered at, that a nation so wise and provident as the English, should at all times have been so deficient in the use of registers, by which alone purchasers or creditors can know with certainty, the estate of the person from whom they buy, or to whom they lend.

In the ancient voluntary conveyances by feoffment and livery, and the after one by lease and release, and the still more modern one by bargain and sale, there was no obligation to record the transmission: Nay, so careless were the ancestors of the English, that these conveyances would have been good, though not reduced into writing, and only executed by parole.

This negligence was bad enough, in all these modes of transmission; but in that of bargain and sale, by which the estate was vested without livery of the land, it was intolerable: and therefore,

fore, by a * statute in the reign of Henry VIII. all bargains and sales were ordered to be inrolled, within six months from their date; and by a subsequent † statute, all conveyances of land for more than three years, were ordered to be executed in writing.

In the securities for debt, the law of that country seems to have been more provident; for on a recognizance or statute being entered into by a debtor, the security was inrolled; and lands could not be extended by elegit without it's appearing on record that they were subject on a judgment to such an incumbrance.

Notwithstanding these precautions, purchasers and creditors remained upon an extreme uncertain footing; for still many kinds of voluntary conveyances were not under a necessity of being recorded: and therefore, through these a man might convey over the same estate to several different people: or, as there was no record of wills, he might grant false security on that estate from which he had been disinherited.

To remedy these things, a practice which had been originally instituted for other purposes, was turned into an instrument of conveyance ‡. Fines were originally no more than a friendly composition and determination of real differences recorded in the superior's court, and they were the more easily admitted, because the pares of the

* An. 27, H. 8. cap. 16.

† An. 29, Ch. 2. cap. 3.

‡ Mad. form, Angl. dissert. pag. 13 & seq. Bacon, vo. 2. pag. 520. & seq.

court, who were the judges of it, were through them, the sooner dismissed from their attendance on the court, and the superior received a fine upon the composition made. But as fines were very much favoured in the law, people took advantage of them, and by feigned acknowledgments of a feoffment, recorded originally in the lord's court, and afterwards removed into, and limited to the king's court, turned these fines into a very secure form of conveyance; for the effect of them was to conclude not only the right of those who were parties to them and their heirs, but to *conclude also all others*, as the statute of fines of the 18th of * Edward I. declares, if they make not their claim within a year and a day.

Although these fines standing thus at common law, or at common law explained and ascertained by statute, were a remedy to much of the uncertainty to which purchasers were formerly exposed; yet another statute †, authorizing estates tail, having declared, that any fine levied of them, should be null and void; no fine could extinguish the rights of heirs of entail: and these settlements in tail being private, and not recorded, the purchaser or creditor had no proper security against them.

To remedy this ‡, a statute of Henry VII. and another of § Henry VIII. explaining it, enacted, that fines for the future, should bar the issue of tenant in tail.

* An. 18. Ed. 1. Stat. of fines.
cap. 1. † An. 4. H. 7. cap. 24.

† An. 13. Ed. 1.
§ An. 32. H. 8. cap. 36.

At the same time, as it would have been very partial to have introduced all these things in favour of purchasers, unless some additional care had likewise been taken of those who had rights in such estates, the necessity of proclamations, was therefore by these last statutes established, and the right of claim, in those having interest in the estate, was extended from one year to five.

The statutes of Henry VII. and Henry VIII. remedied by such means, part of the insecurity of purchasers; but they did not remedy it entirely; for though those statutes barred the issue of tenant in tail, they barred not those who had the remainder or reversion in fee.

A contrivance was therefore fallen upon to bar these last by a common recovery, a form of conveyance, which had formerly been sometimes used to defeat entails, but which after the time of Henry VIII. was used continually, whenever it was necessary to extinguish these remainders and reversions in fee, and by that means became, like a fine, one of the common assurances of the kingdom. This recovery was made good by a feigned suit and judgment recorded, in which the estate was evicted from the tenant in tail, and relief given to him upon the lands of an imaginary warrantee who was worth nothing. As the relief was supposed when obtained, to go in the same course of descent in which the lands recovered would have gone, this was deemed a recompence both to those in remainder and reversion, and

though it was imaginary, they were not permitted to impeach it.

Extended in their effects, as those fines and recoveries are become, though they confer additional security upon purchasers, yet they confer none upon creditors; and even to purchasers there still remain two dangers, against which no foresight can be secure: for as there is no register either for rents or mortgages, the purchaser cannot be certain of the rents to which the land is subjected, and still less of the mortgages affecting it, of which the mortgagee may not even be in possession.

In Scotland it was a considerable time before the alienations of land-property were frequent, and at the time they became so, we had before our eyes all the mischiefs arising from the want of registers in the English forms of conveyances: and therefore the establishment of our registers, instead of being the produce of partial remedies to partial evils, seems to have been the result of an universal, and wise, and provident plan.

Thus by an act of * James VI. extended by two of † Charles II. feifins upon voluntary conveyances were ordained to be registred in certain registers. In involuntary conveyances again, the privy council ‡ ordered all comprisings to be registred; a short record on the allowance of comprisings, came by practice in the place of

* An. 1617. cap. 16.
cap. 11.
March 18.

† An. 1669. cap. 3. An. 1681.
‡ Books of privy-council, lib. 1. pag. 1. 16, 6.

that registration; and this practice, was by a statute * of Charles II. approved of. In transmissions from the dead to the living, by the constitution of the chancery, the retour or verdict of the jury on the service was obliged to be recorded or though there had been no such necessity, the necessity of registering the seisin, would have been sufficient. The same statutes which ordered the registration of seisins, made more effectual, than it had been, the registration of reversions. Real burdens being made good in the feudal form, fell under the necessity of the same registration of seisins. By an act in the reign of † James VII. not only the irritant and resolute clauses of entails, were ordered to be repeated in the instruments of seisin, but a particular record was directed for that species of settlement. Statutes were made in the reign of ‡ James VI. to establish, and to perfect the registration of inhibitions, and interdictions, against those who were prohibited to convey by the law. Many acts of federunt, and other statutes, proceeded upon the same plan with those already mentioned. And to crown all, by a process of reduction, and improbation, and certification following upon it, which cuts off every thing, even rents and mortgages purchasers are more effectually cleared of incumbrances in Scotland, than by a fine and recovery they are cleared of them in England.

* An. 1661, cap. 31. † An. 1687, cap. 22. ‡ An. 1581, cap. 119. An. 1600, cap. 13. An. 1597, cap. 275.

In short, by the number and regularity of our registers, not only purchasers of, but creditors upon land estates, if they are tolerably attentive, are as well assured of the condition of their subject, in the law of Scotland, as they are in the law of any nation upon earth.

Of late years it appears, that the English are becoming sensible of their deficiency in the want of registers, and are attempting to remedy it.

Thus by an act of * queen Anne, a registry is ordained to be kept, of all deeds and conveyances executed, which affect lands in the west riding of Yorkshire. Another statute of the same † queen, established a similar register in the east riding of Yorkshire. A third ‡ does the same in the county of Middlesex. And a statute of the § present king extends it to the north riding of Yorkshire.

In most of the regulations affecting land property, the law of Scotland is approaching to the law of England. But in the establishment and completion of registers, it is probable, the law of England will rather approach to, and imitate that of Scotland.

* An. 2. An. cap. 4.

† An. 7. An. cap. 20.

‡ An. 6. An. cap. 35.

§ An. 8. G. 2. cap. 6.

C H A P. VII.

History of Jurisdictions, and of the Forms
of Procedure in Courts.

I AM far from attempting in this chapter, to give a compleat history of the courts, and far less of the procedure in the courts of Great Britain. I pretend to trace those courts, and that procedure, so far only, as they are connected with the progress, and declension of the feudal system of land-property in that country.

S E C T. I.

THE natural progress of jurisdiction Jurisdiction. seems to be this :

In the rudiments of society, people unite more from the accident of living in the same family, than from any notion of advantage or order : they are all children, or wives, or servants of one head ; the former were under his subjection from their age, the others from their condition, and that power which in his youth he was able to hold through force, he retains in the decline of his life, from authority.

The first tribunals, in the order of things, then, were the domestick.

When many such families are residing together, it cannot be long, till one head of a family, from his superior wisdom or force, becomes master of
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the rest; but his superiority must be supported by the same activity which gained it; and therefore, in this transition from domestick to political government, the chieftain himself, will be not only general in war, but judge in peace.

It seems an invariable truth in the political world, that society shall not remain long in the same state. The small principedom we are speaking of, if the society subsists for any time, either extends itself by conquest, or is changed into a republick; one of which cases must happen, whenever the inhabitants encrease greatly in numbers: in either case, these numbers of inhabitants make it impossible for the supreme magistrate to take cognizance of every cause; and the complexness of their actions producing an equal complexness in the regulations of their actions, puts it out of his power to take cognizance of almost any. The chief magistrate must be too much employed in military, and political, to have either time, or knowledge, for jurisprudential functions. Jurisdiction is therefore intrusted to subordinate magistrates, who may make jurisdiction more immediately their concern.

At the same time, law is not yet, during this period, become so extensive an art, as to give entire occupation to those subordinate magistrates, and therefore, for a long time, they perform the functions of priests, of foldiers, or of senators, together with those of judges. Who the particular persons shall be, who are intrusted with these magistracies, varies with the imaginations

tions and circumstances of different nations. By the Jews, among whom the subordination of internal policy was profound, jurisdiction was given to age. By the Romans, haughty and vain, to splendor of race. The ancient Germans, fierce and free, scorning human, would yield to none but the divine authority ; and, as Tacitus relates, made the ministers of God, the avengers of injustice.

But when the state of society comes nearer its perfection, the greater number of men, and their still greater number of rights, the folly of some, the injustice of others, and the continual intercourse of all, make the science and art of law so extensive, that it can allow no conjunct occupation to those who are intrusted with the care of it ; lawyers then are formed into bodies by themselves, and from these bodies the judges are taken.

This progress is confirmed by the histories of all nations, particularly by that of our ancestors. Tacitus relates, that among the ancient Germans, men had power of life and death in their own families.—The princes who gave a beginning to the feudal system in Great Britain, were at once generals and judges.—When the conquests were settled, their officers shared with them in a regular jurisdiction.—And in the end the power of judging taken from those who formerly enjoyed it, is at present intrusted entirely to judges.

The gradation from the third to the last step of this progress, constitutes the history of
feudal

feudal jurisdictions in Great Britain, and must therefore be traced by itself.

Jurisdic-
tions in Eng-
land.

It is observable, of all the conquests made by all the feudal nations, that to the possession of lands there was always attached a power of judging the people who lived on them. Many particular reasons contributed to this, but a general one is obvious. Those old nations had not arrived at that regularity of police, which makes the arm of the governor, and the voice of the law attended to, through the furthest bounds of the state: fierce as well as independent, they would submit to that authority alone, which could immediately observe, seize, and punish, and that jurisdiction, which in the hands of kings or of judges would have been vain, was therefore given to the proprietors of lands over their own territories.

Upon this system, the lords of charter land, whether * ecclesiastical or civil, among the Saxons, were invested with a power of judging their own people in their own courts, which from the great hall of the manor in which they were held, were called † Halmotes.

In the same manner, the people on the king's land were subject to the king's judge; and the allodial people, or the Liberi ‡, being attached to no lord, in a feignioral capacity, were subject likewise to the king's judge. The name of this judge, in each county, was the Reve or Sheriff,

* L. Ed. Confess. N^o 5.

† Chap. 1.

‡ Spel. Gloss. voce Halmot

who

who had several judges under him, according * to the several divisions of the county; and the name of his court was the Revemote, when he sat as judge of the county, and the † Burghmote, when he sat as judge of a borough.

These courts of the king, and of the lords, had their separate limits; nor could the former ‡ intermeddle in the first instance, with the causes, or the people belonging to the latter.

The only exceptions to this independence of the lords, were the following: When the lord refused justice altogether, or when he was so poor as not to have a court of his own, recourse was had to the king's court; although in this last case, says the § law, *Salvo postea jure baronum illorum*. Again, when one lord pretended to give judgment in the case of a person subject to another lord, in order to prevent the jurisdictions from clashing, they were both obliged to remove to the Revemote, which being the king's court, was deemed to be superior in dignity to both; and for the same reason, when a dispute arose between two thanes, they were obliged, as appears from a || Norman law, reciting a law of Edward the Confessor, to apply to the king's great council, in which he sat himself in person.

It is no objection to this separation of jurisdictions, that the bishop, who, as a lord of charter land, had a court of his own, is yet described in

* L. Ed. Confess. N^o 13. Spel. Gloss. voce Hundredus. † L. Canut. N^o 17. ‡ L. Ed. Confess. N^o 9. L. Eadg. N^o 2. L. Canut. N^o 16. § L. Ed. Confess. N^o 9. || Cart. Hen. 1.

many of the Saxon laws, as sitting together with the sheriff in the king's court: For he sat not there in his own right of jurisdiction, but as called to be an assistant and adviser to the sheriff, who in those times could not be so learned in matters of judgment as the other. What proves this beyond contradiction, is, that the bishop had no * share in the fines of the court; and the right to the fines of the court, was at that time, in all nations of feudal origin †, the sure test, of having, or not having a proper jurisdiction.

From the court either of the lord, or of the sheriff, among the Saxons, there lay an appeal to the king, who sat in his great council, and took cognizance of it. But these ‡ appeals were rare, took place only in singular cases, and were dis-
countenanced.

Upon the Norman conquest, all the § allodial were converted into feudal lands, by which means the earls acquired the same power over the freemen become now their vassals, which had formerly belonged to the king; or rather retaining their former titles, they became in reality lords, and as such, had jurisdiction in their own lands. The necessary consequence of the interposition of the earls between the king and the freemen, was, to throw the power of the king over these last, one step further back. But to prevent the king's power from being by this means entirely excluded the provinces, the sheriff court was still re-

* Doomsday. Chester—Spel. Gloss. Vicecomes.
des Loix, lib. 3. cap. 20.
Nº 16. § Chap. 1.

† L'Esprit
‡ L. Eadg. Nº 2. L. Canut.

tained, and not only upheld in it's ancient powers, but new powers were added to it. It was made * co ordinate with the lords courts in most cases: it was made superior to them, in many cases enumerated by † Glanville, and received appeals from them: and as the ‡ Norman princes obliged the bishops, the lately created earls, and the old lords, all to attendance in it, it received additional splendor.

To give more state to his own jurisdiction, and to keep the provincial jurisdictions in awe, § William the Conqueror established a constant court in the hall of his own palace, called *Aula Regis*, for all matters of right, of crimes, and of finances. This single court executed that business, which is at present divided among the four courts of chancery, king's bench, common pleas, and exchequer. It consisted of the chief officers of the king's palace. The *justiciarius capitalis*, instead of the king, presided in it: and appeals from both the lords courts, and the kings courts, and complaints against all inferior judges, were greedily received, and encouraged in it.

Yet during the reigns of the first princes of the Norman race, almost all suits ¶, even those of the highest consequence, as appears from the famous * decision against the bishop of Bajeux, brother to the Conqueror, were determined in those inferior courts, with a power of appeal to the king's *justiciarius capitalis*, in *aula regis*.

* Bract. lib. 3. cap. 7.

† L. Hen. 1. No 7.

vece court Baron.

‡ Glanv. lib. 12. cap. 9.

§ Bacon voce courts (A.)

* Orig. jurisdic. p. 30.

¶ Bacon

It will be easily imagined, that the king could not be very fond of these territorial jurisdictions of the lords, or even of the sheriff courts, which were sometimes under the influence of the lords. And therefore Henry II. divided the kingdom into six circuits, and sent judges intinerant through the land.

The ignorance of the judges in inferior courts, the variety of customs introduced by so many independent courts, and the management of business by parties and factions in them, were the pretences for this alteration; but the real cause was, the view of humbling the power of the great men in their counties.

Henry was not contented with this; he divided part of the business of the *aula regis*, or of the court of the *justiciarius capital's*, among two new courts, called the king's bench, and the common pleas; the one for criminal, the other for civil matters; and these drew to them, not only by appeal, but in the first instance, many suits which had been anciently decided in the counties: and Edward I. who compleated this division, in order to give more state to these courts, sat sometimes himself in the court of king's bench.

The same prince *, ascertained the boundaries of another supreme court, which had been raised out of the *aula regis*, the court of exchequer. He took opportunities to † abridge the powers of the lords in their own courts. He ‡ invented

* An. 10. Ed. 1. Stat. Rut.

† An. 15. Ed. 1.

‡ An. 3. Ed. 1. cap. 35.

a new jurisdiction, to wit, that of the justices of peace; which being a wheel within a wheel, tended greatly to distract the power of the lords upon their estates. And his successor took the nomination of all the sheriffs into his own hands *, some of whom † his predecessors had been so unwary as to make sheriffs in fee, and of others they had allowed the election to remain in the free-holders, if they inclined to elect.

Edward III. is said to have extended the jurisdiction of the court of chancery; a supreme court, which had likewise its foundation in the *aula regis*; but which afterwards, by applying the remedies of equity to strict law, and by granting injunctions, came to curb the jurisdiction of the other courts, and to swallow up a great part of the business of the common law.

Upon the dissolution of the *aula regis*, and the formation of the four great courts out of its ruins, the house of peers came to be the supreme court of appeal. The king's great council, among the Saxons, had consisted chiefly of the great thanes of the kingdom: the *aula regis*, among the Normans, being made up of the officers of the palace, had likewise consisted chiefly of the great lords of the kingdom: and when the first of these courts of dernier resort was sunk, and the other divided into other courts, the great lords of the realm being assembled by

* An. 9. Ed. 2. cap. 74.
cap. 8.

† Art. sup. Cart. Ed. 2.

themselves, and though a part of the parliament, yet retaining their ancient distinction, fell naturally, according to the analogy of ancient practice, to be considered as the great court of appeal to the nation.

By these means the business of the inferior courts gradually decayed: the king, and the king's courts, by statutes and devices, drew that business to themselves: the feudal jurisdictions sunk: the official jurisdictions rose: at present a landlord cannot hold plea of debt, or trespass, when the debt or damage amounts to forty shillings; and a sheriff is more properly an officer than a judge, and in his county court cannot determine in a debt amounting to forty shillings, unless in consequence of a commission, and by a writ of justices.

Yet even when the feudal jurisdictions were in general put an end to in England, the remains of them appeared, and with vigour too, in the courts Palatine. The Palatines had anciently their own courts, into which the king's writs could not go, and they had a power of pardoning all murders, treasons, &c. with many other royal powers, and many royal appearances, in which these powers were executed. But as it had been the bent of the king, and of his judges, to crush in general the courts of the lords, so it continued to be the aim of both, till they succeeded, to subject these last particular exceptions, as much as possible, to the general law of the land.

The

The county Palatine of Pembroke falling into the king's hands *, was taken away by statute. Although Hexam † had by one parliament been acknowledged to be a franchise where the king's writ went not, and by another had been named a county Palatine; yet in the reign of queen Elizabeth its authority was sifted, and its privileges were taken away by parliament. And ‡ in the reign of Charles I. a jurisdiction in the dutchy of Lancaster, similar to that of the star chamber, was abolished by statute.—Even to the counties Palatine that were allowed to remain, contrivances § were fallen upon, in some cases, to extend the force of the common law. By a statute of Henry VIII. || the county Palatine of Chester, which before was not even linked to the political body, was ordered to send representatives to parliament; and this statute proceeds on a complaint from the inhabitants of the county, that several incroachments had been made, upon “the ancient jnrifdictions, liberties, and privileges of the ancient county Palatine.” Under pretence that justice was not exactly administred in the county Palatine of Chester, power was given to the lord chancellor, by a statute of * Henry VIII. to appoint justices of the peace, and of gaol delivery, within the county of Chester. And an after statute of the 27th † of the same prince, gave a

* Coke, 4 Inst. p. 221.
16. Char. 1. cap. 10.
219, 220.
Hen. 8. cap. 5.

† Coke, *ibid.* 222.
§ Coke, 4 Inst. 215, 218, 2 Inst.
|| An. 34. Hen. 8. cap. 14.
† An. 27. Hen. 8. cap. 24.

† An.
2 Inst.
An. 27.

general and important blow to all those private jurisdictions. This statute recites, "That where
 "divers of the most ancient prerogatives, and
 "authorities of justice, appertaining to the imperial crown of this realm, had been severed from
 "the same, by sundry gifts of the king's progenitors, to the great diminution and detriment of
 "the royal estate of the same, and to the hindrance and great delay of justice:" Therefore, it takes from the proprietors of the counties Palatine, the power of pardon, it takes from them the power of naming justices of eyre, of assize, of peace, and of gaol delivery: whatever powers it takes from the proprietors, it gives to the king: and in order to abolish even the form of the ancient authority, when the reality was gone, it ordains, that all writs and process within the counties Palatine, shall run in the name of the king.

Scots jurisdictions. Such is the progress from territorial to official jurisdictions in England. A progress similar in general, though differing in particulars, may be traced in Scotland. The law of the one country is often no more, than a reflexion, with some variations, of that of the other.

As we have not the knowledge of our antiquities so far back as the English have of theirs, it is impossible in our law, to trace the distinction between the vassals and the freemen, the lords presiding over the one, and the king's officers over the other. But after that distinction was
 abolished,

abolished, the same courts appear equally in the antiquities of both countries.

The kings in Scotland had very early * given away all the crown lands; this made them dependent upon their nobles. The want of property too in feudal times, could not fail to be attended with the want of jurisdiction. And for a very long time, they do not seem to have been so provident, even in controuling the territorial jurisdictions, as the princes in England were.

Hence they granted considerable civil jurisdiction to boroughs and baronies; they granted likewise the power of punishing with death, to such of the former as they erected into sheriffdoms, and to such of the latter as they indued *cum fossa et furca*. They made many of the sheriffs † chamberlains, constables, and other officers of the law hereditary. The king's sheriff lost by disuse, the right which he anciently had, of being present when the lords held their courts ‡, *ad videndum si curia recte tractetur*. Hereditary regalities both ecclesiastical and civil, were erected, with power to judge even in the four pleas of the crown, and with many other powers almost equal to those of the courts palatine in England: and although upon the reformation the ecclesiastical regalities might have fallen, the jurisdictions of the church were preserved § in the hands of private noblemen, when her temporalities were seized. Even private hereditary justiciaries were

* Leg. Malc. 2. † An. 1687. cap. 65. An. 1597. cap. 242.

‡ Stat. Alex. 2. cap. 14.

§ An. 1587. cap. 29.

erected in favour of private persons over their estates: and at last by one grant, the king in a manner surrendered the sword of justice out of his hands, by making the office of the justiciarius of Scotland, an office of inheritance in the family of Argyle.

As these feudal courts, in their constitution, were independant of the king, so in their procedure they were still less dependant upon him, and in a good measure independant of each other. The right of repledging gave a judge a power to * reclaim from another court any person who was subject to his own. Now one baron † could repledge from another. In certain cases a baron could repledge ‡ from the sheriff. The borough could repledge not only from § the sheriff, but from || the justice eyre. And the proprietors of regalities could repledge from * all courts whatever. And not only could the people under these territorial judges be repledged, but when they submitted to other jurisdictions, they † were subject to punishment.

Our kings seem at last to have been sensible of those weaknesses in their government; they became rapacious in their forfeitures, their revocations of the gifts of the crown were frequent, and their attempts to perpetual annexations as frequent.

* Stat. Alex. cap. 4.—Rob. 1. cap. 10.
cap. 8.

† Balf. p. 40.

|| Leg. Burg. 55. & 61.—It. Just. 12.

Skene voce Iter. 12.—Balf. anent Regality.

attach. cap. 27.—Rob. 1. cap. 32.—Balf. of judges.

† Quon. Attach.

§ An. 1488. cap. 1.

* It. Just. 11.—

† Quon. At-

During

During this period, the attempts of the princes to raise their own courts above the feudal courts, and the endeavours of the feudal judges, to keep the determination of law matters in the ancient provincial courts, are very observable.

The king was so far favoured by the subordination of the feudal system, that there lay an appeal from the baron *, to the sheriff or his deputies, and from them † to the justiciary or his deputies, and from the borough ‡ to the chamberlain: a complaint lay § against the judge of the regality to the justiciary; and an appeal from both the justiciary and the chamberlain, to the king and his council. The parliament originally consisted chiefly of the great lords ecclesiastical and civil. By the king's council therefore was meant ||, the parliament when it was sitting, or such of the members as were attending the king, when it was not sitting.

From the same feudal subordination, as the king sat in judgment himself, which he continued sometimes to do, so late as the reign * of James VI. so he had at all times, upon a complaint, a power † of bringing the feudal judges, as well as their parties, directly before himself and his council, or even *before himself, at his empleasance*, as a ‡ statute expresses it.

* Reg. Maj. lib. 3. cap. 21 & 22.

† An. 1503. cap. 95.

‡ An. 1503. cap. 95.

§ Stat. Rob. 2. cap. 13, 14. Rob. 3.

cap. 34.

|| Skene not. ad Reg. Maj. lib. 1. cap. 3.

* Craig,

lib. 3. D. 7. N. 12.

† Skene voce sheriff. an. 1424. cap. 45.

an. 1426. cap. 94.

‡ An. 1469. cap. 26.

But when many of the jurisdictions were become hereditary in families, those appeals to the king's courts were of little use to him; appeals to a parliament independant of him were of still less. And complaints directly to himself, were rare from the dread of the territorial jurisdictions, and from the consequences of a defeat. For which reasons, when a regality fell into the king's hands, he came into the practice of subjecting * the people in it to his ordinary judges, and of annexing the regality itself to the royalty; and in a † particular case he stretched the execution of the sheriff into the bounds of the regality. In one reign he sent a new set of judges, called lords of session ‡, to hold courts where he pleased, three times in the year, and forty days at a time. These judges were chosen by the king as he pleased, from among the estates of parliament. All the powers of jurisdiction which had formerly belonged to the king's great council, were given to them. Although an appeal § from the inferior jurisdictions to the parliament, was allowed, yet, as the lords of session gave more attention to private business than a parliament could do, people chose rather to apply to them than to appeal to it; and as they were a committee of parliament, no appeal lay from them || to the parliament. In another reign, under pretence of the short sessions of these lords, the king put

* An. 1449. cap. 26. An. 1455. cap. 43.
cap. 11. † An. 1425. cap. 65.
‡ An. 1457. cap. 62.

† An. 1449.
§ An. 1471. cap. 41.

another set of judges in their place, called * the lords of daily council. These were a fixed court, sitting continually, as business occurred, at Edinburgh, or where the king resided: they were chosen by him: there was no necessity for his choosing them from among the estates of parliament: they got all the late powers of the lords of session, and which the great council more anciently had. As no appeal had been allowed from the lords of session to the parliament, so it was understood, that no appeal lay from the lords of council to it: and still further, to give less importance even to appeals from the justiciary to parliament, the king, upon a petition to him for an appeal, or, as it is called, a falsing of doom, instead of remitting the affair to parliament, remitted it to thirty or forty persons named by himself, who, according to the words of the statute †, “ had power, as it were, in an parliament, to decide, and discuss the said “ doom.”

So far on the one hand went the endeavours of the princes to raise their own courts above the feudal courts. The possessors of feudal jurisdictions on their side again, procured at one time, a law ‡, repeated often § afterwards, that all suits should pass at first through their ordinary courts. At another time ||, that the lords of session should not judge in questions of heritage,

* An. 1503. cap. 58.

† An. 1503. cap. 95.

‡ An.

1424. cap. 25.

§ An. 1469. cap. 26. An. 1475. cap. 62.

|| An. 1457. cap. 61.

and that in other questions, parties might apply to them or the judges ordinary as they pleased. And afterwards *, that appeals from the sheriff should be discussed in the county, by a justice eyre, consisting of the freeholders of the county.

In this struggle betwixt the king and the lords in support of their respective jurisdictions, one law both readily concurred in, though from far different views. By two statutes in 1455, it was enacted †, that no regalities should afterwards be granted without *deliverance of parliament*; and that no office should be granted for the future in inheritance at all. This law was favourable for the crown, as it tended to secure it against the future alienation of its jurisdictions. On the other hand, those already possessors of regalities and heretable offices, saw the greater splendor arising to their families, from the singularity of a privilege, which all others were precluded from procuring. But the views of both were disappointed by the necessities of succeeding princes, and the ambition of succeeding great families; things took their natural course in spite of the political prohibition, and regalities and other hereditary offices continued to be granted as formerly. The king and the parliament on the succession of every prince repeated the farce of revoking them; but every king added to the number of the grants, and every member of those parliaments who could get such grants, took them.

* An. 1503. cap. 95.

† An. 1455. cap. 43, 44.

The * lords of session once avoided giving a judgment upon the force of the act, but when urged to it in another case, they found that the act itself was in desuetude.

But when the feudal system abated in the closeness of its relations, when the dignity of the crown rose, and when the rising of the people diminished in some degree, the power of those who had most interest in upholding that system, then the feudal jurisdictions yielded to those of the sovereign.

In all degradations of the feudal system, the burroughs, from their tendency to a more general system, were always the first to give way: they first then lost the power of repledging by disuse, and by † statute. The barons followed, and lost by disuse the same power; in the time of ‡ Balfour this power in the barons had almost intirely disappeared. Upon the reformation the weakness of the ecclesiastical regalities made their right of repledging dwindle away into a right of sitting in judgment with the iusticiary, when he had used a prior seizure or citation.

What the feudal courts lost, the king's courts acquired. The supreme court of council and session § was erected by James V. and indued with all the powers, which the lords of session or the lords of daily council formerly had, and with many more. Under the titles of extraordinary lords, several peers of the realm took their seats

* Dict. tit. desuetude.
p. 39.

† An. 1483. cap. 1.
§ 1537. cap. 35.

‡ Balf.

in it; privileges were bestowed on its members, its forms were prescribed, its sessions fixed, and regularity, power, and splendor conferred upon it. The importance of the constitution, was attended with equal importance in the effects of it; for in process of time, this court put an end to appeals * through inferior courts, and by suspension or advocacy brought causes from the lowest directly to itself: it made regalities subordinate to it in civil matters: it withdrew † the whole civil business from the justiciary: it reduced infeoffments though confirmed ‡ in parliament. It even assumed a legislative power under pretence of passing acts of sederunt, for the furthering of justice before itself; and it became a great § doubt among lawyers and politicians, whether its judgments were reviewable in parliament.

In order to balance the feudal jurisdictions even in the smallest matters, the same art which had been used in England for the same purpose, was used in Scotland. The institution of || justices of peace was introduced by James VI. and their powers were daily extended.

Upon the same general plan, the office of justiciary of Scotland was purchased back * by Charles I. from its proprietor. The court belonging to that office was new modelled by

* Skene, voc. sheriff. Bank, vol. 2. p. 551.
2. p. 523. † An. 1567. cap. 18.
obl. on act 1457. cap. 62. || An. 5609. cap. 7.

† Bank, vol.
§ Sir G. M'kenzie
* April,
1628.

Charles II. * and though confined to criminal matters, the justiciary received new splendor in the model. As in those reigns of which we have been just speaking, it still maintained its right of judging in the ecclesiastical regalities together with the baillie, if he neglected first to cite or to seize; so in the reign of king William, it endeavoured to assert the same right of judging in laic regalities, together with the lord who had neglected to cite or to seize the criminal within sixteen days of his committing the fact. The acts of 1693, 1695, and 1702, stretch the power of the justiciary into whatever regalities were in the highlands without ceremony; and the method of extending the same into the private justiciary which the family of Argyle had reserved to itself, when it parted with the office of justiciary general of Scotland, is most curious: The act of † 1693 empowers the king to appoint for two years, commissioners of justiciary for the highlands, and though these are not allowed to extend their jurisdiction into the bounds of the private justiciary, yet the earl of Argyle is obliged to grant a commission to the king's commissioners, who under pretence of the earl's commission, are to stretch their authority into his bounds. The act ‡ of 1695 renews the commission for three years, and still the earl of Argyle is obliged to concur in it. In this form the commission continued to be renewed, till the year 1702 §, when

* An. 1672. cap. 16.
1695. cap. 37.

† An. 1693. cap. 39.
§ An. 1702. cap. 8.

‡ An.

a statute varies the expression somewhat, only *recommends* it to the duke of Argyle to give his commission to the king's commissioners, orders the court to be held in the duke's name as well as the king's, and allows the duke to sit as president in the court. With the antient proprietor of the feudal jurisdiction, the show and the form of authority remained, but the reality and substance was with the king. And not contented with all this, the court of justiciary in latter times, took upon it *, to review, as a superior court, the sentences of all the different regalities.

Yet even when the king's courts were gaining those various superiorities over the feudal courts, these last were far from being sunk altogether. Many baronies had still a power of punishing with death; many sheriffdoms and regalities were hereditary, with considerable jurisdictions; and the attempts to extend the court of justiciary into the bounds of the laic regalities, had ended in a few local temporary experiments, and no more.

James VI. formed a plan of putting an end to the heretable jurisdictions of his kingdom: with vivacity enough to form a project, but with little prudence to conduct, and with still less constancy to persevere in it, he got an act of parliament past, extolling the wisdom of his design, ordaining that reparation should be made to the private proprietors, and naming commissioners, the highest persons of the kingdom, to transact with

* Bank. vol. 2. p. 563.

them. All this great apparatus ended in nothing ; a few sheriffdoms were bought in, and some other project equally vaunted and equally unsuccessful came in the place of this.

Charles I. under pretence of the general revocations in the beginning of every reign, made an attack upon all those regalities and heretable offices, which had been granted posterior to the acts of 1455, prohibiting such grants for the future. He wrote a letter to the lords of session, declaring that he meant not to be precluded by the prescription of the statute 1617, from attacking these grants : but being afterwards advised of the impropriety of cutting down so many grants which had been made and acquiesced in, by so many of his ancestors, which those who got them, thought they were secure in taking, and which had past from hand to hand by sales and execution, he desisted from his measure. Like many other incidents in this unfortunate prince's reign, the unpopularity of the attempt remained with the king, the popularity of dropping it with his ministers.

Cromwell had enough of the monarch to see how inconsistent these private jurisdictions were, either with the interest of the supreme power, or the safety of the people, but he had too much of the tyrant, to think of making any reparation to the private proprietors, from whom * he took their jurisdictions, but to whom he gave nothing in return.

* Scoball's acts, an. 1654 cap. 9.

In this progress of the gaining of the kings upon the feudal courts, I hardly take into my view, the act of 1681^{*}; an act forming propositions concerning the most antient feudal rights, yet founded on abstract, not on feudal principles; an act unhinging the rights of the orders of the state, granting no equivalent for those rights, yet asserting there is nothing taken from their proprietors; an act, in fine, composed in the days of slavery, and † repealed in the days of liberty.

The statute of the present king came last, which abolished some, and limited others, of such of the territorial jurisdictions, as were found dangerous to the community; gave their proprietors a just equivalent, bestowed additional elevation upon the members of the supreme courts, who best could know the laws of their country, and had the most interest to support them; made the power of judging in general official, and brought the courts in Scotland nearly on the same footing with the courts in England.

This statute was plan'd, was pass'd, was executed, and received the thanks of a grateful people within the compass of two years. The ward-holding act and the jurisdiction act were the ideas of ‡ one, to whose plans of police and of law, lord Bacon, had he seen them, would have given the character, which he gave of the laws of another framer of the British police: That "they were deep and not vulgar, not made

^{*} An. 1681. cap. 18.
Fardwicke.

† An. 1690. cap. 28.

‡ Earl of

" upon

“ upon the spur of a particular occasion for the
 “ present ; but out of providence of the future ;
 “ to make the estate of the people still more and
 “ more happy, *after the manner of the legislators*
 “ *in ancient and heroical times.*”

It has been urged against the last of these statutes, that hereditary jurisdictions are barriers against the power of the crown ; and for this the weight of president Montesquieu's authority has been cited. Perversion of judgment not to reconcile that illustrious author's sentiments ! and not to see this truth resulting from such reconciliation ; that though hereditary jurisdictions in absolute monarchies are barriers against the crown, even whilst they form petty tyrannies over the meaner subjects ; yet in limited monarchies, the abolition of them tends to establish, and diffuse law and liberty.

S E C T. II.

ALL barbarous nations are observed Forms of procedure. to have a great deal of superstition, one benefit arising from which, is, that in such nations that superstition tends highly to enforce the natural principles which produce regard for the sanction of an oath : legislators observe this, and endeavour through religion, to subject to the rules of justice, that people, whom justice by herself could not bind.

Our Saxon ancestors particularly, took advantage of this circumstance, and drew the first determination

termination of law-suits from the sacred regard paid to an oath. As far back as the reign of * Hlothar and Eadric, when a complaint was preferred against a party, he defended himself by his own oath, and the oaths of a certain number of compurgators, swearing to their belief of his credibility.

This form of procedure might be tolerable in civil cases, but in criminal cases the temptation to perjury was higher; therefore in these, the ordeal was † afterwards introduced; and exorcism, and ‡ many other awful ceremonies used in it, the more effectually to discover the truth.

Aburd as these methods of carrying on law-suits may appear, they were neither of them destitute of foundation in the political situation of the people. As the Saxons were very regular and minute in the divisions of their people, as every family had an eye on the neighbouring families in its proper division, and as the compurgators could be taken only from that division, it is more than probable, that their oaths to the credibility of a party, gave a tolerable certainty that he was worthy of credit; and in the ordeal again, as the defender was allowed § to compound with the accuser, the ordeal was only an expedient to force him to give satisfaction to the person he had injured.

* Leg. Hloth. & Ead. N. 4, &c. A.D. 67,
postrem. Inæ.
Athelst. N. 21.

† Spell. Gloss. ordalium.

‡ Lex.
§ Lex.

During the whole Saxon period then, these were the only forms in which controversies in law were decided.

But when the Normans came over and settled in England; the mixture of foreigners and natives, the mutual hatred they bore to each other, the extensions of a new system, the convulsions in the old one, and the daily increase of numbers and of intercourse, made people distrust, and justly, the oaths both of parties and compurgators.

It was very natural for a soldier, when he saw another going to carry off his property by a false oath, to challenge him to fight; the superstition of the times too, made people readily imagine, that heaven would interpose for the side that had right; and the frequent injustice arising from the perjury of parties, stood in need of a check. These things had introduced the decision of law suits by combat into Normandy, and it was by the Normans* transplanted into England: probably too, it was the example of the same Normans which made it find its way into Scotland, as the Saxon conquest or the Saxon example had formerly introduced the oath and ordeal into it.

However absurd this form of maintaining actions may appear, it was like the foregoing not altogether destitute of reason. At a time when the passions of men were furious, and the voice of the laws weak, it was right to prevent general

* L. Gul, 1. Wilk. p. 218. Cod. leg. vet. in Wilk. p. 288.

quarrels by particular combats, and to subject to rules in a court, that sword, which might have raged abroad without any.

During the reigns of the Norman princes, there appears to have been a struggle betwixt the clergy on the one hand, in support of the oath and ordeal, and the laity on the other, in support of the form of the combat; for though the oath and the ordeal remained * in the publick ordinances, and though some bishops † took a right in their charters of using the ordeal, yet it appears, from almost every page of Doomsday, that the claimants were continually offering battle in support of their rights.

But when more regular governments came to be settled, the uncertainty arising from such rules of judgment, was easily remarked.—The trial by oath went into disuse.—Henry III. in England, by a special precept ‡ to his itinerant judges, prohibited the trial by ordeal; William the Lion in Scotland §, restrained the abuse of it, by discharging it in the courts of the lords, unless in presence of his own judges: and Alexander II. ¶ prohibited it altogether.—Henry II. in England *, and David I. in Scotland †, although they were not allowed to abolish the duel entirely, yet granted to the defendant the privilege either to fight, or to throw himself upon an assize of

* L. Gul. i. 11, 16, & 71.

† Brad. v. i. p. 147.

‡ Orig. Jurid. p. 37.

§ Stat. Will. cap. 16.

|| Stat.

Alex. 2. cap. 7.

* Glanv. lib. 2. cap. 7.

† Reg. Maj.

lib. 4. cap. 1. quon. attach. cap. 61.

twelve men. And even in this alternative, the duel was limited almost as soon as the alternative was introduced: For as in the course of these papers it has often been observed, that all declensions in the feudal manners took place first in the burroughs, so many of king John's * charters to burroughs contain this clause, *nullus eorum faciat duellum*; and David I. † exempted burgesses in almost every case, from the necessity of fighting: The same exemption was afterwards extended by degrees to other people: David II. ‡ granted to gentlemen the privilege of fighting by a champion.

Laws, especially laws so much connected with the manners of a people as these were, take a long time before they are entirely rooted out; and therefore, notwithstanding these various discouragements, it continued still possible, to trace these forms of procedure in the law.—As some § bishops in England had taken the right of ordeal in their charters, that right could not be taken from them but by publick law.—The combat ¶ lasted in England, with the alternative of an assize, for several reigns: One of the sons of Edward III. * wrote a treatise on the form and the rules of the duel; and in one particular case it was used as late as the reign † of queen Elizabeth, and in Scotland it was used without any alternative, in capital crimes, where there was a

* Brad. of Bur. append. p. 8.

† Leg. Burg. cap. 14.

‡ Stat. David 2. cap. 28.

§ Spellm. gloss. p. 435.

¶ Brac.

lib. 3. cap. 18. Segar. fol. 137.

* Spellm. gloss. campus.

† Spellm. gloss. voc. campus, p. 103.

deficiency of other proof, in the time * of Robert III, and even later, as appears from the authority † of Skene:—The trial by oath continued in Scotland, in the reign of David II. ‡ when either no proof was offered against the defendant, or § the proof was difficult to be brought: and in England it remains at this day in the wager at law. By wager at law, the defendant, where apparent proof is not brought by the plaintiff, is allowed to clear himself by his own oath, and the oath of as many credible persons, averring they believe he swears true, as the court shall appoint.

With these exceptions, however, the form of procedure by assize continually gained ground, till it came to be firmly established both in England and in Scotland.

But a remarkable difference arising from the different constitutions of the superior courts in England and Scotland, soon appeared in the two countries.

The court of session by James I. and II. the court of daily council by James IV. and the court of council and session by James V. were all made to consist of such a number of judges as were sufficient for an assize, and were therefore supposed to supply the place of one.

In the sheriff courts and in the justiciary courts, the trial by juries it is likely, remained as late as the reign || of James IV. but when the justiciary was

* Stat. Rob. 3. cap. 16. † Skene duellum. ‡ Stat. David 2. cap. 44 § Stat. David, II. cap. 1. N. 6. || An. 1503, cap. 95.
sup-

supplanted in his civil jurisdiction, by a more numerous set of judges, the practice of those judges, to judge without a jury, set an example to the inferior courts, and in these courts likewise, the trial by jury in civil cases fell into disuse.

But the remains of the antient form of trial by jury in civil cases are still to be seen, in the procedure * upon the three retourable and the four unretourable brieves.

From the same principle that the court of session is a jury, it is, that in one particular case †, it is necessitated to take the whole proof in presence of the whole judges; and that all proofs allowed by the court, ought regularly to be, and are generally reported to the whole judges.

The example of the civil courts led many of the inferior ones, to judge in smaller crimes without the assistance of a jury; but the court of justiciary being supreme, takes examples from its ancient customs alone, and according to those continues still to judge by an assize.

The same extent and refinement of society, which removed men from particular to general courts, and which made forms of trial depending upon chance, yield to the certain and uniform decisions of law, produced another alteration in the form of procedure at law.

In all simple nations it is observable, that as there are a great many ceremonies used in constituting an obligation, or making good a transfer,

* Bank, vol. 2. p. 554.

† Forgery.

so there are certain strict and fixed forms used in all proceedings at law. Among such a people, the transactions of mankind are not very intricate or numerous; all the claims arising from these transactions are easily reduceable into strict forms; they are accordingly reduced into them, and judgment is given in the precise terms of these forms.

Thus in the Roman law, originally, all actions were *stricti juris*, the Patricians invented the *legis actiones*, they reduced every claim that could be preferred into a certain brief, or what is in that law called a formula, and upon that formula, judgment *stricti juris* was given.

The same cause produced the same effect, both in England and in Scotland. Originally, in both countries, every right had its particular brief*, issuing from the chancery, in which it was to be made good; and at that time no judgments could be given except they applied precisely to the terms of the brief. This in England went so far, that before the reign of Edward I. whenever there was a new case, that seemed to require a remedy, the chancery referred the plaintiff to petition the next parliament; but because this multiplied petitions to parliament, a statute was past, authorizing the clerks of chancery to invent a new writ if the case was similar to any case falling under a former writ, or if the clerks could not agree, ordering the case to be hung up till in the next parliament a writ should be contrived for

* Skene breve—Eitz, de nat, brev.

it. The statute is in these * words : “ Et quoties-
 “ cunque de cætero evenierit, in cancellar, quod
 “ in uno casu reperitur breve, et in consimili casu
 “ cadente sub eodem jure, et simili indigente re-
 “ medio, non reperitur ; concordent clerici, de can-
 “ cellaria, in brevi faciendo, vel atterminent que-
 “ rentes in proximum parliamentum, et scribantur
 “ casus in quibus concordare non possunt, et refe-
 “ rant eos ad proximum parliamentum, et de con-
 “ sensu jurisperitorum fiat breve, ne contingat de
 “ cætero, quod curia domini regis deficiat conque-
 “ rentibus, injusticia perquirenda.” And in Scot-
 land, by an act of † James the IV. it was ordained,
 “ That na brieves, nor uthers letters, be given to na
 “ partie, bot after the forme of the brieves of the
 “ chancelarie used in all times of before.” And
 by another ‡ of James VI. it was ordained, “ That
 “ nae writer to the signet should take upon hand,
 “ to wryte, or put in forme, any maner of signa-
 “ ture or letter to be past his majesty’s hand,
 “ that contains noveltie contrair the accustomed
 “ stile and forme.”

But when men become more numerous, their
 intercourse is greater, their actions are more com-
 plex, and consequently their claims are less sim-
 ple ; for rights supported on new modifications
 of the actions of mankind, cannot be subjected
 to briefs invented at a time when these modifica-
 tions were unknown ; and as there is a greater
 latitude in the form of the claim, so there is a
 greater latitude in the views of the court.

* Westm. 2. cap. 24.
 1535. cap. 13.

† An. 1491. cap. 24.

‡ An.

Hence in the Roman law, the distinction betwixt actions *stricti juris* and *bonæ fidei*; the directions of the prætor in these last to determine, *uti inter bonos et æquos agier oportet*; the office of the prætor himself *ad corrigendum et temperandum juris rigorem*; and the invention of actions *præscriptis verbis*; hence in England, the permission given to the chancery of forming new writs; the invention of actions on the case; and the jurisdiction of the chancery itself considered as a court of equity. Hence, in Scotland, the gradual extension * within these two hundred years, in the natures of summonses; and the powers of the clerks to the signet; the acts before answer granted by all † courts; the general interlocutors inferring only in general the pains of law, passed on the relevancy of criminal libels; and the junction of a court of equity and of strict law, in the constitution of the college of justice.

It is thus that laws gradually alter and gradually refine. Men complain of the multiplication of laws, of forms, and of courts; they do not see, (to use the words of an author ‡ who saw through the whole spirit of law) *that the trouble, expence, delays, and even dangers of judiciary proceedings, are the price which every subject pays for his liberty.*

* Craig, lib. 2. D. 17. par. 25. & Stair, lib. 4. tit. 1. p. 2.
 † Bank, vol. 2. p. 556. ‡ Esprit de loix, lib. 6. cap. 2.

C H A P. VIII.

History of the Constitution of Parliament.

FEW subjects of enquiry have more engaged the writings and the passions of men in Great Britain, than those regarding the constitution of parliament. But while some have directed their enquiries only to exalt the power of the crown, and others only to exalt that of the commons, few have tried the justness of their notions, by the only object which could throw light on the question, or bestow assurance upon their conclusions. The object I mean is that feudal system, which varying in its state, and extensive in all its operations, made the constitution of parliament follow its gradual changes, in the same manner that it caused the nature of tenures, the power of alienation, the force of entails, the rules of succession, the forms of conveyances, and the property of jurisdiction, to vary with all its variations.

From the obligation of the king's vassals to be suitors in his court is generally derived the origin of parliaments : the conclusion seems too hasty : did it follow from the vassal's being the object of jurisdiction himself in the king's court, or even from his attending there as a peer to his brother vassals in a judicative capacity, that therefore he was entitled to become a law-maker himself, to advise and reprove that lord paramount, to whose court he owed attendance, only as an object, or an in-

ment of justice, or to controul his sovereign in the administration of his government? parliaments then must have arisen upon some further foundation.

The supreme government in all uncivilized nations is exceeding lax. If the chief ruler is general in war and judge in peace, he is *general only* from the dread of the enemy, and because in the time of war, it becomes the interest of all to submit to one. He is *judge only* from the dread, that without a common arbitrator, the country would become, even in time of peace, a scene of blood. But when things concerning the society in general come to be consulted or determined, the power of consulting and of determining is conceived to lie in the society itself, or in the heads of the tribes of it. As one of the society the chief ruler has a right to be present at the deliberation, and as the chief person of the society he asserts and is allowed the right of presiding in it; but his power is merely that of presiding, attended with the influence which, perhaps, his presiding may give him, and nothing more. If even as general in war his soldiers are disobedient to him; if even as judge in peace he is not able to restrain his people from outrages; it can hardly be thought, that he should have a power of regulating the publick concerns of the society without the publick consent. A general assembly of a nation, or of the heads of its tribes, arises, therefore, from the natural course of things; and the

the powers of such an assembly, must in the same natural course be very extensive.

Perhaps, with regard to uncivilized nations, all reasonings and conclusions from political views are fallacious, because uncivilized nations are generally incapable of forming such views; yet, if these were attended to among the feudal nations at all, it could not but occur, that possessed as the king was of the military service of his vassals, of the power of judging them in his own courts, and of applying most of the profits of those courts to his own use; if he had likewise had the exclusive political part of the government in his hands, the military, judicative, fiscal, and political powers, would all have centered in his person; a junction which could not fail to be productive of despotism. But the feudal manners and spirit tended to an oligarchy: It was not likely that chieftains, who in the countries from which they originally came, were so little inferior to the prince, as to be called his *Comites*, that is, his companions; and who in the conquered countries were asserting the same military, judicative, and fiscal powers upon their own estates; would give up the sole political administration to a person, the value of whose life was estimated by the law like any other persons, and whose murder was forgiven on the payment of a few * thousand thrimshas by his murderer. Even in an age dark in political views, it required no great reach of thought in

* Jud. civ. Lund.

the chieftains to foresee the danger to themselves of joining so many powers in the prince. Their former equality gave them a right to be of his counsels. The rule of the fiefs, that the vassal should give intelligence and advice to his lord against his enemies, made this right a duty. And perhaps the frequent occasions of attending in a judicative capacity, gave them the better opportunity of asserting that right, under pretence of performing the duties of vassals and of judges.

In the feudal settlements the persons attending the king's great councils, called since parliaments, were the *proceres regni*, those who had originally been his companions, and were now his immediate vassals, whether civil or ecclesiastical, and the more considerable officers of his court and crown. I speak at present not of Britain, but of Normandy, of all France, of the Low-Countries, of Germany, of Italy, and of the whole feudal world. In the antiquities of none of those countries, are the commons or the burgesses to be heard of as members of the great councils; the immediate vassals ecclesiastical and civil of the sovereign, and the officers either civil or military of the sovereign, are the only persons appearing in them.

Barons. They who think that during the reigns of the Saxon kings, and of the first princes of the Norman race, there were no Parliaments in England, attend little to the state of the feudal system at the time; but they who think that the commons sat during those reigns in parliament attend still less to it, In the Saxon times the nation

was

was composed of the lords of charterland both civil and ecclesiastical and the people under them, of the counts or earls and the allodial people under them; the people under the lords were either tenants at will, or for a few lives, slaves in a manner to their masters, they could not pretend to become rulers over their countrymen: Those again, who were under the counts, or the allodial people, were not even tied to the community by the feudal bond, and therefore could have no suffrage in the feudal councils; so that * the lords ecclesiastical and civil, as holding of the crown, and the great officers in virtue of their offices, as well as in virtue of their being generally vassals to the crown †, together with the sages of the law, either the king's judges or the king's council, called *Sapientes*, were the only constituent members of the Saxon parliaments. This will appear obvious to any one, who takes a view of the preambles to the laws of most of the Saxon kings. We have no records of the laws of Scotland in those distant ages; but from the authorities of our historians, the *proceres regni*, and the *sapientes* or the sages of the law, were the first constituent members of our parliaments.

During the reigns of the first Norman princes, the commons were continued ‡ in the same subjection; the allodial people were indeed brought into the feudal system, but then from the book of doomsday it appears, that the whole lands of the

* Spellm. gloss. parliamentum and remains.
vol. 1. p. 241.

† Brad. pref. hist.—and of Bur.

‡ Cart.
country

country were either the demesne of the king and worked by his slaves, or tenants at will ; or were held by the great barons, or the counts, or the church ; and that in like manner the burroughs were either demesne of the king ; or were held by the barons, or the counts, or the church. From the same book it appears, that in the time of the conqueror, the whole lands of England, exclusive of those of the church, were possessed by 700 immediate vassals of the crown, an infinite number of men under them of a slavish condition, called *servi*, *villani*, *bordarii*, and a very few soccage tenants of poor and trifling possessions. As all who held of the king in capite sat in parliament, the nation was at that time represented by a body as numerous as at present, and by the proprietors of almost the whole land of the kingdom, if one can apply the word representation to men who sat in parliament, not as representing others, an idea at that time unknown, but in their own right, not to protect the people from slavery, but to preserve themselves against tyranny.

Commons. Calculated as the feudal system was, to bar the alienation of land property, it could not however withstand the natural necessities and desires of mankind ; it was impossible in the nature of things these 700 original vassals could keep their fiefs for ever intire, creditors were clamorous, younger children were to be provided for, and therefore, in spite of all the restraints of the feudal law, partitions of estates were made, either

ther voluntarily by their proprietors, or by force of law.

This increased the number of the king's vassals in the counties.

Again, although in the Saxon times the inhabitants of the towns or the burgwaren were in the lowest condition, yet for the benefit of trade they had formed themselves into communities and gilds : though in a manner the property of others, and subject to the officers and magistrates of those in whose dominion they were ; yet with respect to each other in matters of trade, they were allowed to have their own laws and police. As the Normans were further advanced in the arts of life, than the Saxons had been, the inhabitants of the towns grew into some estimation soon after the conquest : the Norman kings and lords bestowed upon those communities and gilds which they found erected for the benefit of their members only as traders, the privileges of men and of freemen : they enfranchised the inhabitants ; to the communities, by way of appanage, they gave territories in property ; they farmed to them their own census and taxes ; they withdrew the officers, who in right of the king or the lords, had governed the town, or collected its taxes, and allowed the inhabitants courts, and officers, and magistrates of their own. The charter of enfranchisement of Great Yarmouth by king John, points out most of these alterations ; and relates *,

Quod progenitores domini regis tenuerunt, prædictum

* Brady Bur, append.

burgum, in manibus suis propriis, percipiendo omnia proficua inde exeuntia, de portu, usque ad tempus Joannis regis qui concessit villam, burgensibus villa, ad feodi firmam. The gift of the territory in perpetuity, and the feofarm of the census and taxes in perpetuity, constituted a fief not in the particular members of the community, but in the community itself in general. This fief was said to hold by a tenure, from the subject of it called burgage; the community represented by the governing part of the burrough was the vassal; and when, either by the original right of the king, or by a right derived to the king from a lord, the king was superior in this fief, that governing part was the immediate vassal of the crown, and if the members of it observed the feudal principles and orders, they owed attendance in parliament, not as barons, but as vassals to the crown, and if not in person, from the inconveniency of their too numerous appearance, yet by representatives elected by themselves.

Lord Coke says *, the king shall not have "primer seisin of lands holden in burgage, as "some have said; for that is no tenure in capite." Madox †, in his *Firma Burgi*, brings a number of authorities to show, that burgage was accounted a tenure in capite. It may be true with lord Coke, that it was not a tenure in capite, to the effect to carry primer seisin, but surely it can bear no doubt, that it was a tenure in capite,

* Coke Lyttlet. sect. 103. sect. 8;

† Mad. form. burg. cap. 1.

to the effect of obliging to attendance in parliament. — In the time of the conqueror, none but vassals by military tenures were entitled to sit in parliament, because at that time all the vassals in capite who had their lands in descent, held by military tenures; but when many of these tenures were changed into tenure by soccage, the persons possessed of them still sat in parliament, because, on the one hand, they were not *vilani*, and on the other hand, they were the king's immediate vassals. In the same manner, when some time after the conquest, the tenure of burroughs was changed, or rather was created, and their communities were made to hold freely of the crown, instead of being in demesne, can it be doubted, that their members, or the representatives of their members, sat likewise in parliament? they were not *vilani* more than the soccage tenants, and they held immediately, that is in capite, of the king equally with them. The preamble to the statutes of Robert III. says, “*summonitis, more solito, burgenses, qui de domino rege tenent in capite.*”

The alteration made in the condition of these inhabitants, then, tended to increase the number of the king's vassals in burroughs.

Add to this partition of the original fiefs, and to this erection of the burgage fiefs, that the crown came further into the custom, of granting its demesne lands, both in the counties, and in the burroughs, in fief.

This was a third source of increase to the number of the king's vassals.

These changes produced a great alteration in the appearance of the orders of the state ; for as the ancient summons to parliament ordered all those to come *, *qui de nobis tenent in capite*, the vassals who had a right to come thither, once few and powerful, were now become numerous beyond measure, and many of them poor.

This attendance at a time when the same advantage did not accrue from it as at present, and new parliaments were called much oftener than they are now, was by these last, complained of as a burden. There are instances in the history of England, of barons denying their tenures to avoid the attendance, of burroughs denying their title, of sheriffs returning, that in whole counties they could not get a burgeses to send up ; and lord Coke's authority †, that charters granted of exemption from parliament, are against law, shows that such charters were asked, and were given. In order to relieve those who were unable to bear the burden of attendance, it was therefore ordained, that the great barons should attend in person, but the small barons and the burgeses only by their representatives ; and it is likely that a representation from the burgeses, as early as the burgeses came into parliament, had paved the way for a representation from the small barons. At the same time a distinction was made in the form of summoning the greater and the smaller vassals ; the former were summoned each *sigil. atim*

* Mag. chart, Joan. & preamb. to stat. of Rob. 3. † Coke
4 inst. 49.

per literas regis, the latter only in general *per vice-comites*.

This alteration in respect to the persons summoned, and the manner of summoning to parliament, was probably made by statute in the reign of king John. The record of the statute is lost, together with the other statutes of his reign; but the form of the distinction in the summons is preserved, in the *Magna charta* of that prince. And in the writs of his son Henry III. the sheriffs are directed to return the knights of the shire, and the burgesses.

The like alteration happened in Scotland, though at somewhat a later period, as the declension of the strict feudal system came always later in this country than in England. The record of the statute is preserved in the year 1427*. By that statute it was declared, that the small barons and free tenants needed not come to parliament, provided they sent commissioners from the shires, but that the king should summon the great barons, and church-men, by his special precept.

These laws bringing the representatives of the shires and of the burroughs into parliament, laid the foundation of the power of the commons, in Great Britain.

The great number of members in the English parliament made it difficult, in all the perambulations of parliaments, to find one room capable of holding the whole members; and therefore they

* An. 1427. cap. 101.

came to be divided into two houses. The members of the Scotch parliament on the contrary, being less numerous, the same difficulty of finding a room large enough did not occur; and therefore, even after the introduction of the commons, the whole members sat in one house, and made but one assembly.

It has been said, that the privilege of sitting in parliament was given to commissioners of shires, in England, by Simon de Montfort, to secure him in his power. It has been said, that the same privilege was given to the commissioners for burroughs, by Edward I. in order to procure from them supplies, when he was in war with France, and foresaw it from Scotland. The mistake arises from attending too much to political, and too little to natural and to feudal views. The feudal system, slow and regular in its movements, was not to be whirled about, in subserviency to ministers, or even to exigencies. The ranks of the state, intitled to government, were fixed in the original constitution; gradual alterations in the constitution might produce gradual alterations in the ranks of the state, and accordingly, the gradual enfranchisement of the burroughs, the gradual dismembering of the great baronies, and the gradual distribution of the demesne lands of the crown, brought the burgeses and the freeholders into parliament: but that new ranks should be made, by a political nod, to start up at once, in order to deprive those of government, who had possessed it for centuries, is not to

be

be credited, in that system, which of all others, was the most exact, in ascertaining the orders of men. If the commons were brought into parliament, to serve a political purpose, in England, what was the political purpose, and where was the Montfort, or the Edward, who brought them into parliament in Scotland ?

The same dissipation of land property, *Peers.* which brought the commons into parliament, produced a great alteration in the nature of the nobility, intitled to sit there.

Originally, dukes, earls, and barons were no other than officers appointed over certain districts, the possession of which gave them a title to certain emoluments and privileges, and subjected them to certain duties. One of these privileges, and likewise duties, was attendance in parliament. It has been shown, that originally feudal grants, were not even hereditary : as soon then, as a duke, earl, or baron was stripped by the prince, of power over his district, he ceased to be an officer ; he owed no longer attendance in parliament, and the person who was put in his place in the province, took his place in the great council : afterwards, these offices came to be hereditary, and none could be stripped of them, except for their crimes ; but still, if a person stripped himself of his office, by giving away, or selling his fief, it is obvious, by a continuation of the same principles, that he ceased to be a feudal officer ; he could not enjoy the privileges attached to a subject which he had

given away. nor render duties in return for that fief which another enjoyed. Hence it appears, that the feudal peerage was originally territorial, not attached to the person, but to the possession of the feudal estate. The castle of Arundel conferring an earldom on the proprietor of it, is said to be a remain of the old law, in this respect, in England: and * the late essays on British antiquities give us an instance, in Scotland, of an † earldom sold for money, by which sale, all the honours attending it, were transferred to the purchaser.

This constitution might last as long as there were few sales of fiefs, and as long as only powerful families or persons were the purchasers: but when in the progress of luxury, alienations became frequent, and through the same progress mean people were enabled to become purchasers; it was impossible, that either the pride of the nobility, or the splendor of the kingdom, could suffer so unnatural a mixture. The peerage then ceased to pass with the fief: the king, in order to prevent the body from expiring, created peers himself; these sat with the ancient peers by prescription; and the dignity of peerage from being feudal, territorial, and official, became allodial, personal, and honorary.

The author of the late *Essays on British Antiquities*, has traced the progress of this alteration with an accuracy that equally entertains and instructs. From his enquiries it appears, that “the

* P. 85,

† Earldom of Wigton,

“ first

“ first form of the creation of an earl, was that
“ of a grant of an office over a county.—When
“ by the multiplication of earls, the earldoms
“ were become more numerous than the counties,
“ the form was to erect a particular estate into
“ an earldom, or county ; which was all that was
“ necessary, to bestow upon the proprietor, the
“ territorial dignity.—Afterwards, when the no-
“ tion of personal honour crept in ; certain so-
“ lemnities were used at the creation of a peer,
“ such as girding him with a sword, covering his
“ head with a cap of honour and circle of gold,
“ all of them marks of personal respect.—And
“ now, both in England and Scotland, the notion
“ of territorial dignity being quite worn out, an
“ earl’s patent is so framed, as to import a mere
“ personal dignity, without relation either to of-
“ fice, or to land.”

The erection of the house of commons in Eng-
land, whose interests being to support the people,
were opposite to those of the lords ; and the in-
troduction of the new nobility, who owing their
rise to the crown, were devoted to it ; tended
much to weaken the power of the ancient barons.
At an æra when the commons had risen upon the
barons, and yet had not quite sunk them, so that
both balanced and weakened each other, Henry
VIII. was the most absolute monarch that ever
sat on the English throne. At an æra when
the commons had risen upon both the king and
the peerage, Charles I. was in a state, the weakest
that a king of England had ever been reduced to.

The similar constitutions of parliament in England and Scotland, by the introduction of the commons, and of the new nobility, ought to have had, it would be thought, similar effects in both countries; yet they had not. In England, the commons rose immediately to vast power: In Scotland they never attained any power in the legislature, and it is only since the revolution, they attained even common freedom.

Many things contributed to this difference.

The most general and important cause was the different circumstances of the two nations themselves: England was a trading country, and though originally the land property was ingrossed by the great nobles, yet in the progress of trade, the commons bought from those nobles, great part of their lands: but power follows property: the same cause which made the nobility powerful originally, made the commons powerful afterwards. In Scotland, on the other hand, we had little or no commerce; the land property was ingrossed by the nobility, and it continued to remain so, as long as we had parliaments: the same cause then, which raised the commons in the one country, depressed them in the other.

Again, the commons in England forming an assembly separate from that of the peers, became a body more distinguished by themselves: they reared up rights and privileges peculiar to their assembly: once made a distinct order in the constitution of government, they struggled to balance the peers, and having ballanced them, they
struggled

struggled next to overcome them: being taken from the commons, they were favoured by them, and favoured the commons in return. The knights of shires, and the burgesses in Scotland, on the contrary, continued all along to sit in the same house with the peers: the nation carried away with the splendor of these last, lost sight of their own representatives; and the representatives themselves imposed upon by the same splendor, lost the idea of their own importance. There could be no balance where there was no distinction of assemblies: the commons could set up no distinct rights and privileges in a single body, of which they only made a part: and not favoured by the people, they would not favour the people in return.

Again, by the statute *Quia Emptores* in England, upon the dismembering of a fief, the new purchasers were made to hold not of the alienor, but of the chief lord; and therefore when the king's vassals were allowed to alienate, all the purchasers from them were made to hold directly of the crown: whereas, in Scotland, as the statute *Quia Emptores* did not take effect, many of the purchasers held of the lords from whom they purchased, so that the crown vassals were not multiplied by the addition of all the new purchasers.—Further, in England, by an act of * Henry VI. every free-holder possessed of land of forty shillings of present rent, was intitled to vote at elections, which law stands to this day: whereas,

* An. 3. Hen. 6. cap. 7.

in Scotland, by an act of James * VI. none were intitled to vote in the counties, who had not a forty shilling land, not of present rent, but of old extent, holding of the king. By an act of † Charles II. those voting on church lands were obliged to have 1000 *l.* Scots of present rent. By another act in that † reign, voters were obliged to have either a forty shilling land of old extent, or 400 *l.* Scots of valued rent. And by later statutes still greater attention is required, to the purity of rolls, so circumscribed in their nature, and where intrusion and abuse would be so provoking. — Lastly, by repeated resolutions of the house of commons in England, it has been determined, where prescription has not fixed the manner of electing in particular boroughs, that the election of members for boroughs, shall be, not in the common council, but in the whole body of the burgesses; whereas, in Scotland, the election for a borough lies in the common council, and not in the whole body of burgesses.

From these different circumstances, it has happened, that while there are above 30,000 voters in some particular counties in England, there are not in Scotland, above 3000 voters, free-holders and common council men included.

The constitution of Scotland, till incorporated with that of England, was in fact a mixture of monarchy and oligarchy: the nation consisted of a commonalty without the privilege of chusing

* An. 1587. cap. 114.
1681. cap. 21.

† An. 1661. cap. 35.

‡ An.

their

their own representatives; of a gentry intitled indeed to represent by election, but unable to serve the nation; and of a nobility, who oppressed the one, and despised both.

In this situation, the representatives of the commons discouraged with their own insignificance, either did not attend the parliament, or surrendered their privileges when in it. It appears by the acts of 1457, and 1503, that though the act of 1427 had given the free-holders a power of sending representatives to parliament, yet none, or few, were sent: and when the rolls of parliament *are looked into, it appears that during more than 70 years preceding that called in 1560, most parliaments were attended by no barons by tenure at all, the rest by three or four, and once I think by twelve at the utmost.

The erection of the lords of articles, a court committee, which under pretence of preparing business for the parliament, admitted, and excluded what they pleased, annihilated almost the constitution of that body. Is it then to be wondered at, that while the English parliament, in the reign of Charles II. were arraigning the conduct of that king and his ministers, the Scotch parliament were pouring forth, to a prince not beloved by their nation, addresses, filled with adulations †, to a minister who was hated by themselves.

The revolution first brought other maxims into our government, and the union gave other

* Keith hist. p. 146. & rot. parl.

† Duke of Lauderdale, rights

rights to our part of the legislature; so that now, our lords and commons being incorporated with those of the English, the constitution of Scotland is settled upon that just poise, betwixt monarchy, aristocracy, and democracy, which has made the constitution of England the wonder of mankind.

Whether the limited number of the Scotch electors, or the extended number of the English, is the most advantageous, is doubtful. For if the former is more easily managed by a minister, the latter is more easily driven into fury by a faction. And though it is true, that what concerns all, should be judged by all, yet it is equally just, that those who have the largest share of the property, should likewise have the largest share of that legislature, which is to dispose of it.

In the declensions of almost every part of the feudal system, the English have gone before us: at the distance sometimes of one, and sometimes of many centuries, we follow. However distant, at present, the prospect may appear, there is no impossibility, in a future age, that that limitation of electors, which subsists at present, from the lingering of the feudal system amongst us, may give way, to the more extended, and allodial right of election, which takes place among the English.